CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1908

No. 454

JAY B. PHELPS, APPELLANT,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK AND STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY

No. 455

LUCY ASKAM ET AL., APPELLANTS,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK AND STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY

APPEALS FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

FILED [illegible], 1908.

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IN SUPREME COURT OF NEW JERSEY

[Seal of the Court]

WRIT OF CERTIORARI

NEW JERSEY, ss:

The State of New Jersey to the Board of Education of the Town of West New New York and the State Board of Education, Greeting:

We being willing for certain reasons to be certified of a decision made on February 9, 1935 by the State Board of Education of the State of New Jersey on an appeal to said State Board of Education from a decision of the Commissioner of Education of the State of New Jersey, dated July 18, 1934, in the matter of Jay B. Phelps, appellant, and Board of Education of the Town of West New York, respondent; do command you that the said decision, together with all things touching and concerning the same, as fully and entirely as before you they remain, to our Justices of our Supreme Court of Judicature at Trenton, on the 7th day of May, 1935, you certify and send, together with this writ; that therein may be done what of right and according to the laws of this State should be done.

Witness, Thomas J. Brogan, Esquire, Chief Justice of our Supreme Court, at Trenton, this 23rd day of April, 1935.

Fred L. Bloodgood, Clerk. McCarter & English, Attorneys.

I allow this writ. Let it be sealed.

Dated April 22, 1935.

Charles W. Parker, J S. C.

[fol. 3] STATE OF NEW JERSEY; DEPARTMENT OF PUBLIC INSTRUCTION

JAY B. PHELPS, Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, Respondent

PETITION OF APPEAL

Jay B. Phelps, the above named appellant, hereby petitions the Commissioner of Education of the State of New Jersey to review and set aside the resolution adopted by the Board of Education of the Town of West New York on June 23, 1933, by which resolution the salary of the appellant was reduced from $3200.00 annually to $2784.00 for the period between July 1, 1933 and July 1, 1934. A true copy of said resolution is hereto annexed as Schedule A. The appellant sets forth that said resolution was unlawfully adopted and is illegal and says that:

1. By contract dated May 4, 1921 appellant was employed to teach in the public schools of the Town of West New York for a period of one year, beginning September 1, 1921. Said contract provided for a salary of $2300 to be paid to appellant in twelve equal monthly installments.

2. Appellant has been continuously engaged as a teacher in the public schools of the Town of West New York during all school years since the school year 1921-1922, having [fol. 4] taught in said schools from September 1921 until the present time. For the school year 1922-1923 the contract of appellant to teach in the public schools of West New York was renewed and the salary of appellant increased to $2450 per annum. For the school year 1923-1924 said contract was again renewed and the salary of appellant was increased to $2600 annually. For the school year 1924-1925 said contract was again renewed and the salary of appellant was increased to $2750. Since the school year 1924-1925 the contract of appellant to teach in the public schools of West New York has continued in full force and effect and for the school year 1925-1926 the salary of appellant was raised to $2900; for the school year 1926-1927 the salary of appellant was raised to $3050, for

the school year 1927-1928 the salary of appellant was raised to $3200 and for the school year 1928-1929 the salary of appellant was fixed at $3200.00. The said salary of appellant remained fixed at the sum of $3200 for the school years 1929-1930, 1930-1931, 1931-1932 and 1932-1933.

3. Appellant has been engaged as a teacher in the public schools of the Town of West New York for a period of more than three consecutive years and no written charges have ever been preferred against appellant and appellant has not been charged with or been guilty of inefficiency, incapacity, conduct unbecoming a teacher or other offenses constituting just cause for the reduction of his salary or the termination of his employment.

4. The aforesaid resolution of the Board of Education of the Town of West New York dated June 23, 1933, purports to reduce the salary of appellant by 13% per annum [fol. 5] for the school year 1933-1934. Appellant alleges and shows that said resolution is in violation of the provisions of an act entitled "An Act to establish a thorough and efficient system of free public schools and to provide for the maintenance, support and management thereof," approved October 19, 1903, and the several amendments thereof and supplements thereto, in that, among other things, appellant is entitled to retain his employment under tenure without diminution or reduction of salary or compensation. Appellant further alleges and shows that said resolution is an illegal and improper interference with the terms of his said contract of employment and is without force and effect as a modification of said contract.

5. Appellant is informed and believes that said resolution dated June 23, 1933 was adopted by the Board of Education of the Town of West New York in reliance on "An Act respecting the salaries or compensation of officers and employees of and persons holding positions in the several school districts of this State," approved February 4, 1933. Appellant alleges and shows that said Act is unconstitutional and without force and effect insofar as it purports to authorize a reduction of the salary of appellant without regard to the tenure protecting the appellant and without regard to the contract of employment under which the appellant has served and is serving as a teacher in the public schools of West New York.

6. Appellant further alleges and shows that said resolution dated June 23, 1933 does not comply with the provisions of said Act approved February 4, 1933 in that said resolution discriminates among and between individuals in the same class of service, and said Board of Education in [fol. 6] applying said resolution has discriminated among and between individuals in the same class of service.

7. Since the passage of said resolution dated June 23, 1933 appellant has accepted no compensation for the school year 1933-1934 for the performance of his duties as a teacher in the public schools of West New York, and appellant has not agreed expressly or impliedly to the terms of said resolution dated June 23, 1933 nor to the manner in which said resolution has been applied by the Board of Education of the Town of West New York.

Appellant therefore prays that an order may be made by the Commissioner of Education of the State of New Jersey setting aside and declaring invalid the action of the Board of Education of the Town of West New York in attempting to reduce the compensation of appellant from $3200 to $2784 for the school year 1933-1934, which action of said Board of Education is embodied in its resolution dated June 23, 1933. And appellant prays for such other relief as may be necessary and proper in the premises.

McCarter & English, Attorneys of Appellant.

[fol. 7] SCHEDULE "A" TO PETITION

Resolved, That between July 1, 1933, and July 1, 1934, the salaries of the superintendent of schools and of all principals, supervisors and teachers in the West New York School system be and they are hereby reduced as follows:

All salaries from $1200 to $1999 per annum reduced ten per cent;

All salaries from $2000 to $2499 per annum reduced eleven per cent;

All salaries from $2500 to $2999 per annum reduced twelve per cent;

All salaries from $3000 to $3499 per annum reduced thirteen per cent;

All salaries from $3500 to $3999 per annum reduced fourteen per cent;

All salaries from $4000 to $5600 per annum reduced fifteen per cent;

all figures being inclusive; provided, however, that the salary of any elementary school teacher shall not be reduced below the minimum of $1200 per annum, and the salary of any high school teacher shall not be reduced below the minimum of $1600 per annum.

(Sgd.) Arthur H. Einbeck.

Dated June 23, 1933.

[fols. 8-9] *Duly sworn to by Jay B. Phelps. Jurat omitted in printing.*

[fol. 10] STATE OF NEW JERSEY; DEPARTMENT OF PUBLIC INSTRUCTION

JAY B. PHELPS, Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, Respondent

ANSWER—Filed January 15, 1934

The Board of Education of the Town of West New York for answer to the petition of Jay B. Phelps, respectfully says:

1. It admits the allegations contained in paragraph 1 of the petition, except as to the manner in which the salary was to be paid, but as this feature is irrelevant to the questions presented for adjudication, proof thereof is hereby waived.

2. It admits the allegations contained in paragraphs 2, 3, and 7 of the petition.

3. It admits the allegation contained in the first sentence of paragraph 4 of the petition, but denies the balance of the allegations contained in said paragraph.

4. It admits the allegation contained in the first sentence of paragraph 5 of the petition, but denies the balance of the allegations contained in said paragraph.

[fols. 11-12] 5. It denies the allegations contained in paragraph 6 of the petition.

Respondent therefore prays that the petition be dismissed.

The Board of Education of the Town of West New York in the County of Hudson, by Reinhold Hekeler, Its Attorney.

Duly sworn to by Leo V. Roth. Jurat omitted in printing.

[fols. 13-14] STATE OF NEW JERSEY; DEPARTMENT OF PUBLIC INSTRUCTION

JAY B. PHELPS, Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, Respondent

STIPULATION OF FACTS—Filed May 12, 1934

It is hereby stipulated by and between the respective parties to the above entitled cause that said cause be submitted for determination upon such facts contained in the petition of appeal as are admitted by the answer of the respondent to said petition and upon the additional facts stated in the following paragraphs:

1. The following list shows the names of all persons holding New Jersey teaching certificates who are employed in the West New York School system. Said list also shows, for each of the persons named, the type of certificate held, the original date of appointment in the West New York school system, initial salary, approximate number of years of service, the salary for the school year 1932-1933, and the salary for the school year 1933-1934:

High School

Name	Certificate	Date of Appointment	Initial Salary	Approximate Yrs. of Service	Salary 1932-1933	Salary 1933-1934
Carlos Woodworth	Perm Supv. & Sec.	Aug. 1917	$1,900	16½	$5,000	$4,250.00
Elizabeth Borneman	Perm. Sec.	Feb. 1916	800	18	3,900	3,354.00
Lucy Askam	" "	Sept. 1918	1,200	15½	3,200	2,784.00
Anne Bollenbacher	" "	Sept. 1927	1,200	6½	1,875	1,687.50
Louis Brenner	Limited Spec. Com'l. Ed.	Sept. 1933	1,600	½		1,600.00
Leonard Burns	Perm. Man. Tr.	Sept. 1925	1,750	8½	2,650	2,332.00
Edward Carroll	(Phys. Tr.) Perm.	Sept. 1919	1,800	14½	3,400	2,958.00
Elvira Chricosta	" Sec.	Sept. 1923	1,900	10½	3,100	2,697.00
Helen Clohosy	" "	Sept. 1922	1,950	11½	3,200	2,784.00
Genevieve Creighton	" "	Sept. 1923	1,600	10½	2,825	2,486.00
Alice DeBros	Limited Sec.	Feb. 1931	1,600	3	1,675	1,600.00
Bertha DeLaney	Perm. Sec.	Feb. 1926	1,250	7½	1,800	1,620.00
Marguerite Dolan	" "	Feb. 1929	1,600	5	1,975	1,777.50
Viola Donovan	Perm. Stenog., Type, Bkkeep.	Sept. 1923	1,775	19½	2,875	2,530.00
Marie DuBois	Limited Sec.	Sept. 1933	1,600	½		1,600.00
Ida Egan	Perm. Sec.	Sept. 1928	1,750	5½	2,200	1,958.00
Walter Eickmann	" "	Sept. 1928	1,600	5½	2,075	1,846.75
Florence Eldred	Perm. Spec. Drawing	Sept. 1922	1,600	11½	3,050	2,653.50
Willis Eshleman	Perm. Sec.	Sept. 1920	2,000	13½	3,400	2,958.00
Marie Manda Felitti	" "	Sept. 1922	1,300	11½	2,750	2,420.00
Henry Fink	Limited Spec. Art	Feb. 1932	1,600	2	1,600	1,600.00
DeWitt Fisher	Perm. Sec.	Nov. 1921	2,100	12 2/10	3,200	2,784.00

High School—Continued

Name	Certificate	Date of Appointment	Initial Salary	Approx-mate Yrs. of Service	Salary 1932-1933	Salary 1933-1934
	Mech. Draw.					
Zabelle Gabriel	Perm. Sec.	Sept. 1923	1,400	10½	2,750	2,420.00
Louis Gerisch	" "	Sept. 1929	1,600	4½	1,900	1,710.00
Bertha Godfrey	" "	Sept. 1920	1,750	13½	3,400	2,958.00
Fannie B. Godlin	" "	Sept. 1927	1,400	6½	2,050	1,824.50
Abe Golden	Perm. Sec.	Sept. 1920	1,600	13½	3,200	2,784.00
Alice Halfpenny	" "	Sept. 1924	1,400	9½	2,525	2,222.00
Esther Hanna	Perm. Sec. & Type, Stenog.	Sept. 1918	1,000	15½	3,400	2,958.00
Kenneth Hart	Perm. Sec.	Jan. 1922	2,200	12	3,200	2,784.00
Emma Hubert	" "	Feb. 1921	1,850	13	3,400	2,958.00
Reintrant E. Jonsson	" "	Sept. 1924	1,600	9½	2,750	2,420.00
Carl Kauffman	Perm. Man. Tr. Shopwork	Sept. 1920	2,100	13½	3,400	2,958.00
Herman Krause	Perm. Sec.	Sept. 1919	1,600	14½	3,400	2,958.00
Rose Millimet	Perm. Elem.	Sept. 1915	560	18½	2,300	1,600.00
Nicholas LeRose	Perm. Com'l.	Sept. 1930	1,600	3½	1,750	1,600.00
Nicholas Lessner	Perm. Sec.	Sept. 1925	1,600	8½	2,600	2,288.00
Alice Luckings	" "	Sept. 1921	1,900	12½	3,400	2,958.00
John McGrath	" "	Feb. 1928	1,600	6	2,125	1,891.25
Vincent McGuinness	" "	Sept. 1924	2,050	9½	2,975	2,618.00
Gerald McInerney	Man. Tr.	Oct. 1923	1,900	10½	3,200	2,784.00
Ruth Meinzer	Perm. Sec.	Feb. 1931	1,600	3	1,675	1,600.00
Blanche Miller	" "	Feb. 1929	1,675	5	2,050	1,824.50
John Moorhead	Limited Sec.	Sept. 1933	1,600	½		1,600.00
Edna Moreau	Perm. Sec.	Sept. 1923	1,400	10½	2,775	2,442.00

Cornelius O'Connor	" "	Sept. 1924	1,600	9½	2,700	2,376.00
Alice Palmer	" "	Sept. 1929	1,600	4½	1,900	1,710.00
Jay B. Phelps	" "	Sept. 1921	2,300	12½	3,200	2,784.00
[fol. 16]						
Gertrude Reiley	Perm. Spec. Phys. Tr.	Sept. 1921	$1,350	12½	$3,025	$2,631.75
Nathan Richman	Perm. Sec.	Sept. 1933	1,600	½		1,600.00
Mary Robinson	" "	Feb. 1921	1,750	13	3,200	2,784.00
Robert H. Rollins	" "	Sept. 1926	2,200	7½	2,950	2,596.00
Thomas Roop	" "	Feb. 1922	2,200	12	3,200	2,784.00
Mary Ross	Perm. Sec.	Feb. 1922	2,100	11	3,400	2,958.00
Lillian Schlesinger	Limited Spec. Stenog., Type.	Sept. 1930	1,600	3½	1,750	1,600.00
Peter Scottong	Perm. Sec.	Feb. 1923	1,800	11	3,175	2,762.25
Edna Stone	Perm. Sec. Drawing	Feb. 1921	1,800	8	3,400	2,958.00
Gilbert Wagner	Perm. Sec.	Sept. 1921	2,300	16	3,200	2,784.00
John White	Perm. Sec.	Sept. 1929	1,600	4½	1,900	1,710.00
Bernice Young	" "	Feb. 1929	1,600	5	1,975	1,777.50
		School No. 1				
Becker, Inez A.	2nd State	Apr. 1915	700	18¾	2,500	2,200.00
Bergen, Rose E.	Perm. Elem.	Sept. 1922	1,400	12½	2,425	2,158.25
Bruggemann, Dorothy	Perm. Elem.	Sept. 1933	1,200	½		1,200.00
Buonaccorsi, Jennie	Perm. Elem.	Sept. 1923	1,200	11½	2,075	1,846.75
Chase, Mary E.	Per. Music Supervisors	Sept. 1926	1,800	7½	2,300	2,047.00
Dankert, Minnie E.	Perm. Elem.	Feb. 1918	700	15½	2,500	2,200.00

School No. 1—Continued

Name	Certificate	Date of Appointment	Initial Salary	Approximate Yrs. of Service	Salary 1932-1933	Salary 1933-1934
Drenkard, Adele	Perm. Spec. Dom. Sci.	Sept. 1927	1,400	6½	1,800	1,620.00
Eckardt, Elsie H.	Perm. Elem.	Sept. 1923	1,200	10½	2,025	1,802.25
Ekegren, Esther	Per. Kg. Primary	Sept. 1923	1,200	10½	1,950	1,755.00
Forbes, Ida B.	2nd State	Sept. 1905	510	28½	2,500	2,200.00
Freedman, Mary	Perm. Elem.	Sept. 1924	1,200	9½	2,025	1,802.25
Ginsburg, Rose	Perm. Elem.	Sept. 1921	1,500	12½	2,300	2,047.00
Girsham, Mae H.	Perm. Elem.	Sept. 1920	1,350	13½	2,300	2,047.00
Gleason, Gertrude A.	Perm. Phys. Tr.	Sept. 1928	1,700	5½	2,025	1,802.25
Grossman, Olga	Perm. Elem.	Feb. 1926	1,400	8	2,075	1,846.75
Hangley, Frances	Perm. Elem.	Sept. 1918	700	15½	2,300	2,047.00
Hodkin, Anne	Perm. Elem.	Sept. 1924	1,250	9½	2,025	1,802.25
Kaelin, Tillie	" "	Sept. 1922	1,400	11½	2,100	1,780.00
Klees, Evelyn	" "	Nov. 1919	800	14¼	2,200	1,958.00
Lev, Tillie	" "	Sept. 1925	1,200	8½	1,900	1,710.00
Litzenberg, Samuel R.	Sp. Shop Work	Sept. 1926	1,700	7½	2,525	2,222.00
Logan, Jennie M.	Perm. Elem.	Apr. 1919	800	14 5/6	2,300	2,047.00
Logioio, Josephine	Perm. Elem.	Feb. 1922	1,200	12	2,075	1,846.75
Lundell, Audrey	" "	Feb. 1922	1,200	11½	2,250	2,002.50
MacEwan, Harriet	Per. Kg. Prim.	Feb. 1916	635	18	2,475	2,202.75
Marinovich, Cath.	Perm. Elem.	Mar. 1927	1,200	6½	1,715	1,543.50
Meyers, Maude	" "	Sept. 1922	1,200	11½	2,225	1,980.25
McArdle, Margaret	" "	Sept. 1921	1,550	12½	2,500	2,200.00
McDermott, Agnes	" "	June 1923	1,200	10½	2,125	1,891.25
Michaels, Dorothy L.	Per. 2nd	Sept. 1923	1,200	10½	2,150	1,913.50
O'Keefe, Kathryn E.	Perm. Elem.	Dec. 1907	480	26½	2,500	2,200.00

Rafter, A. Maud	3rd Gr. State	Feb.	1914	750	20	2,500	2,200.00
Rank, Lillian M.	Perm. Elem.	Sept.	1920	1,100	13½	2,300	2,047.00
Reiley, Alysse	" "	Sept.	1919	800	14½	2,375	2,113.75
Reineman, Gertrude	" "	Sept.	1924	1,200	8	1,950	1,755.00
Rice, Ethel	" "	Sept.	1933	1,200	½		1,200.00

[fol. 17]

Robinson, Jean	Sp. Drawing	Sept.	1920	$1,600	13½	$3,200	$2,784.00
Russell, Alida M.	2nd Grade St.	Sept.	1911	700	22½	2,500	2,200.00
Smith, Dorothy V.	Phy. Tr. Cert.	Aug.	1927	1,400	6½	1,800	1,620.00
Stocking, Vaughn D.	Supervisors	Nov.	1908	680	25 1/6	4,300	3,655.00
Welch, Jessie A.	Per. Elem. State	June	1901	460	32½	2,500	2,200.00
Whelan, Adelaide	Perm. Elem.	Feb.	1929	1,200	5	1,450	1,305.00
White, Loretta	2nd Gr. State	Sept.	1921	1,600	9½	2,500	2,200.00
Williams, Susan	Spec. Drawing	May	1927	1,800	6½	2,275	2,024.75
Winter, Nell L.	Perm. State	Sept.	1921	1,600	12½	2,500	2,200.00
Yachter, Ethel	Perm. Elem.	Sept.	1930	1,200	3½	1,300	1,200.00

School No. 3

J. E. Dransfield	Perm. Supv.	Mar.	1919	1,800	15	4,000	3,400.00
Katherine Donovan	Perm. Drawing	Feb.	1930	1,400	4	1,550	1,400.00
Ruth Lindstrom	Perm. Spec. Music	Sept.	1929	1,400	4.9	1,600	1,440.00
Mollie Abramson	Perm. Elem.	Feb.	1928	1,200	6	1,600	1,440.00
Alice Brewton	Limited Sec.	Sept.	1925	1,700	8½	2,450	2,180.50
Margaret Chaplin	Perm. Elem.	Sept.	1925	1,500	8½	2,150	1,913.50
Geneva Dobbs	" "	July	1919	800	14½	2,300	2,047.00
Ella Field	" "	Sept.	1921	1,200	9	1,775	1,597.50
Clara S. Greene	Perm. Kg. Prim.	May	1916	560	17½	2,400	2,136.00
Ruth Humphrey	Perm. Elem.	Sept.	1924	1,200	9½	2,000	1,780.00

School No. 3—Continued

Name	Certificate	Date of Appointment	Initial Salary	Approximate Yrs. of Service	Salary 1932-1933	Salary 1933-1934
Lillian Hunt	Perm. Elem.	Sept. 1918	700	15½	2,500	2,200.00
Harriet Jochem	" "	Sept. 1929	1,200	4½	1,400	1,260.00
Caroline Johansen	" "	Nov. 1918	700	15½	2,300	1,600.00
Grace Kaiser	" "	Sept. 1922	1,200	11½	2,225	1,980.25
Wilma A. Lindlof	" "	Sept. 1924	1,200	9½	2,000	1,780.00
Alice Mitten	" "	Sept. 1927	1,200	6	1,400	1,260.00
Mary Nolan	" "	Sept. 1922	1,600	11½	2,300	2,047.00
Sylvia Schweitzer	" "	Sept. 1930	1,200	4½	1,300	1,200.00
Lenora Spellman	" "	Sept. 1916	660	17½	2,500	2,200.00
Elizabeth Steinel	" "	Sept. 1916	560	17½	2,125	1,891.25
Augusta Taubman	Perm. Sec.	Sept. 1930	1,400	3½	1,500	1,400.00
Carolina Trott	" "	Sept. 1929	1,400	4½	1,600	1,440.00
Elvira Wiese	Perm. Kg. Prim.	June 1926	1,200	7½	1,800	1,620.00
		School No. 4				
Ruth Austin	Perm. Elem.	June 1915	$ 700	17½	$2,475	$2,202.75
Bess F. Berry	" "	Jan. 1913	700	21	2,500	2,200.00
Olive Browne	" "	Feb. 1926	1,600	8	2,125	1,891.25
Teresa Camfield	" Sec.	June 1924	1,450	9½	2,000	1,780.00
Florence Caso	" Elem.	Sept. 1929	1,200	4½	1,400	1,260.00
Florence Connell	" "	Sept. 1928	1,200	5½	1,500	1,350.00
Helen Crocker	" "	Sept. 1912	685	21½	2,500	2,200.00
Rosella Dyroff	Perm. Sec.	May 1920	1,400	13½	2,500	2,200.00
Rose Hirshman	Perm. Elem.	Sept. 1926	1,200	7½	1,800	1,620.00
Celia Klinger	" "	Feb. 1929	1,400	5	1,650	1,485.00
Hazel Lake	" "	Sept. 1920	1,100	13½	2,300	2,047.00

Julia Martin	" "	Sept.	1928	1,200	5½	1,500	1,350.00
Mary McGuinness	" "	Sept.	1926	1,200	7½	1,750	1,575.00
Anne McKeown	Perm. 1st Gr. County	Oct.	1897	175	30½	2,500	2,200.00
Edith Miller	Perm. Elem.	July	1911	560	22½	2,500	2,200.00
Sara Mindlin	Perm. Elem.	Apr.	1922	1,200	11½	2,200	1,958.00
Edith Mounce	" "	Nov.	1921	1,200	11 7,10	2,200	1,958.00
Katherine Redding	" "	Sept.	1911	680	22½	2,500	2,200.00
Isabel Riese	" "	Sept.	1928	1,200	5½	1,525	1,372.50
Mary Spellman	" "	Nov.	1914	700	19½	2,500	2,200.00
Virginia Swenson	Perm. Kg. Prim.	Oct.	1930	1,200	3½	1,290	1,200.00
Cecelia Vogt	Limited Elem.	Sept.	1933	1,200	3		1,200.00
Charlotte Weiss	Perm. Elem.	Apr.	1919	800	14½	2,500	2,200.00
Marie Wintrich	Special Kg.	Sept.	1906	500	27½	2,500	2,200.00
Mary Lucas	Perm. 1st Gr.	Sept.	1896	350	37½	4,400	3,740.00

[fol. 18]

School No. 5

W. W. Staver	Perm. Supv.	Sept.	1916	$1,600	17½	$4,300	$3,655.00
Laura Brandt	Perm. Elem.	June	1922	1,200	11½	2,175	1,935.75
Edith Brown	Sec. Gr. State	Sept.	1910	700	23½	2,500	2,200.00
Grace Carroll	Perm. Elem.	Apr.	1919	800	14½	2,500	2,200.00
Margaret Claffy	Sec. Gr. State	June	1909	620	24½	2,500	2,200.00
Mary Clark	" " "	Sept.	1906	710	26 3/10	2,500	2,200.00
Ethel Creamer	" " "	Aug.	1908	590	25½	2,500	2,200.00
Retta Curry	Perm. Elem.	June	1919	800	14½	2,225	1,980.25
Nettie Feit	" "	Sept.	1925	1,200	8½	1,900	1,710.00
Edna Folley	" "	Jan.	1921	1,100	13	2,300	2,047.00
Florence Goldsmith	" "	Feb.	1926	1,200	8	1,750	1,575.00
Frieda Harris	" "	Sept.	1933	1,200	3½		1,200.00
Caroline Hauschild	" "	June	1912	610	20½	2,500	2,200.00

School No. 5—Continued

Name	Certificate	Date of Appointment	Initial Salary	Approximate Yrs. of Service	Salary 1932-1933	Salary 1933-1934
Minnie Holthusen	Perm. Elem.	Oct. 1909	560	24½	2,500	2,200.00
Kathryn Holtje	" "	Aug. 1921	1,600	12½	2,375	2,113.75
Alice Hugger	" "	May 1921	1,100	12 6/10	2,275	2,024.75
Harriet Johansen	" "	June 1917	600	16½	2,000	1,780.00
Edna Klenk	" "	Feb. 1927	1,200	7	1,725	1,552.50
Eleanor Knoepfel	" "	Feb. 1926	1,200	8	1,825	1,642.50
Margaret Kretschman	" "	Feb. 1922	1,200	9	2,275	2,024.75
Marie Lauer	" "	June 1922	1,200	11½	2,150	1,913.50
Martha Leino	" "	Sept. 1921	1,450	12½	2,300	2,047.00
Katharine Lyons	" "	Sept. 1925	1,200	8½	1,875	1,687.50
Dorothea McFarlin	" "	Feb. 1925	1,200	9	1,875	1,687.50
Marie Miller	" "	Feb. 1926	1,500	8	2,175	1,935.75
Carrie Morris	Sec. Gr. State	Apr. 1913	800	20½	2,500	2,200.00
Margaret Morris	" " "	Aug. 1911	650	22½	2,500	2,200.00
Blanche Muller	Perm. Elem.	Sept. 1925	1,200	8½	1,925	1,732.50
Dolores Mulvihill	" "	Mar. 1920	1,150	12½	2,300	2,047.00
Viola Neubert	" "	Sept. 1929	1,200	4½	1,400	1,260.00
Saidie Nicoll	Perm. Kg. Prim.	July 1917	600	16½	2,300	2,047.00
Lucille Robertori	Perm. Elem.	Sept. 1923	1,200	10½	2,100	1,869.00
Florence Robinson	" "	Sept. 1920	1,450	13½	2,300	2,047.00
Filomena Sarubbi	" "	Jan. 1917	560	17	2,250	2,002.50
Blanche Sonder	" "	July 1913	560	18.4	2,125	1,891.25
Ellen Smith	Perm. Kg.	Apr. 1921	1,400	12½	2,300	2,047.00
Ida Smith	Sec. Gr. State	Dec. 1921	1,645	16	2,500	2,200.00
Marjorie Stein	Perm. Elem.	Mar. 1921	1,200	10	2,100	1,869.00
Harriet Stillwell	" "	Mar. 1920	1,100	13½	2,225	1,980.25

Alice Swinston	Sec. Gr. State	June	1910	630	23½	2,500	2,200.00
Johnetta Thorne	" " "	June	1916	800	17½	2,500	2,200.00
Jennie Thorpe	" " "	July	1920	1,500	13½	2,500	2,200.00
Ellen Tierney	Perm. Elem.	Mar.	1920	800	13.8	2,300	2,047.00
Mabel Roberson	Perm. Sec.	Sept.	1926	1,450	7½	1,975	1,777.50
Elwood McFarlin	Perm. Shop Wk.	Sept.	1926	1,700	7½	2,450	2,180.50
Helen Byrne	Perm. Spec. Drawing	Sept.	1907	800	25 2/3	3,500	3,010.00
G. A. Pohl	Perm. Spec. Phys. Tr.	Aug.	1916	1,200	17½	3,400	2,958.00
		School No. 6					
Ethel G. Agolia	Perm. Elem.	Sept.	1926	1,200	6 1/5	1,675	1,507.50
M. Virginia I. Beam	" "	Sept.	1919	800	9	1,650	1,485.00
Frances Borg	" "	Sept.	1927	1,200	6½	1,600	1,440.00
Matilda Cascardo	" "	Sept.	1933	1,200	4		1,200.00
Mary Bracanovic	Limited Elem.	Sept.	1933	1,200	2 4/5		1,200.00
Mary Collins	Perm. Elem.	June	1915	560	18½	2,490	2,216.10
Elizabeth Cullinan	" "	Sept.	1924	1,200	9½	2,000	1,780.00
Amy L. Dromeshauser	" "	Sept.	1929	1,200	4½	1,400	1,260.00
[fol. 19]							
Edith M. DuBois	2nd State	Apr.	1908	630	24	2,500	2,200.00
Pauline Farber	Perm. Elem.	Sept.	1923	1,200	10½	2,050	1,824.50
Frances Gerisch	" "	Feb.	1927	1,200	7	1,700	1,530.00
Ruth S. Gulkis	Limited Sec.	Sept.	1933	1,200	½		1,200.00
Julia Harris	Perm. Elem.	Sept.	1926	1,200	7½	1,725	1,552.50
Olive Humphrey	" "	June	1917	600	16½	2,300	2,047.00
Emma Kingston	2nd State	Sept.	1913	700	20½	2,500	2,200.00
Nellie Lavery	Perm. Elem.	June	1921	1,200	12½	2,275	2,024.75
Nancy Logan	Perm. Elem. & Spec. defectives	Sept.	1920	1,435	17 8/10	2,500	2,200.00

School No. 6—Continued

Name	Certificate	Date of Appointment	Initial Salary	Approximate Yrs. of Service	Salary 1932-1933	Salary 1933-1934
Anne Machewirth	Perm. Elem.	Dec. 1919	800	14 1/5	2,300	2,047.00
Arline Mansfield	Perm. Kg. Prim.	Apr. 1922	1,200	11½	2,200	1,958.00
Palmera Martignone	Perm. Elem.	Sept. 1933	1,200	3½		1,200.00
Lillian Miller	" "	Jan. 1927	1,200	5½	1,660	1,494.00
Ann Mitten	" "	May 1924	1,200	9½	1,950	1,755.00
Rose Movsesyan	Perm. Kg. Prim.	Sept. 1926	1,200	7½	1,750	1,575.00
Harriet G. Parrott	Perm. Elem.	Apr. 1919	800	14	2,000	1,780.00
Anna Parsek	" "	Sept. 1929	1,200	4½	1,400	1,260.00
Alice M. Rowlands	" "	Sept. 1922	1,200	11½	2,250	2,002.50
Adelaide Schmidt	Perm. Kg. Prim.	Sept. 1926	1,200	6½	1,750	1,575.00
Katherine Schultz	Perm. Elem.	Sept. 1929	1,200	4½	1,400	1,260.00
Ruth Socol	Perm. Elem.	Sept. 1933	1,200	3½		1,200.40
Helen Thomas	" "	Sept. 1929	1,200	4½	1,400	1,260.00
Fannie B. Traum	" "	Feb. 1928	1,200	6	1,600	1,440.00
Estelle Zellman	Perm. Kg. Prim.	Feb. 1925	1,200	9	1,975	1,777.50
Charlotte Cole	Perm. Elem.	Sept. 1921	1,350	12½	2,425	2,158.25
Joseph Cuviello	Limited Spec. Music	Feb. 1931	1,400	3	1,450	1,400.00
I. V. Diamond	Perm. Supv.	June 1907	720	26½	3,400	2,958.00
Carl LaRose	Perm. Spec. Man. Tr.	Feb. 1928	1,400	6	1,750	1,600.00
Elizabeth Morse	Perm. Spec. Subnormal	Sept. 1914	800	19½	3,350	2,914.50
Mary P. Diamond	Perm. Supr.	Sept. 1904	650	29½	4,100	3,485.00

The following list shows the names of clerks and nurses employed in the West New York school system who do not hold New Jersey teaching certificates. Said list also shows for each of the persons named, the original date of appointment in the West New York school system, initial salary, approximate number of years of service, the salary for the school year 1932-1933, and the salary for the school year 1933-1934:

Clerks

	Date of Appointment	Initial Salary	Approximate Yrs. of Service	Salary 1932-1933	Salary 1933-1934
Marie Martin	Nov. 1924	$1,000	9.3	$1,500	$1,200.00
Virginia Otis	Sept. 1930	1,000	3½	1,100	1,000.00
Sylvia Wilson	July 1924	1,000	9½	1,500	1,200.00
Angela Wintrich	Feb. 1923	1,100	11	1,500	1,200.00
Cathleen Bach	Sept. 1925	1,000	8½	1,500	1,200.00
Marion Holm	Sept. 1933	900	½		900.00
Madelyn Offerman	Oct. 1925	1,000	8	1,000	1,200.00
Helen Roth	Sept. 1933	900	½		900.00

Nurses

Mary V. Quinlan	Jan. 1925	$1,400	8½	$2,000	$1,600.00
Catherine Collins	Sept. 1923	1,750	11	2,000	1,600.00
Edna Craddock	Oct. 1920	1,400	13½	2,000	1,600.00
Catherine DeLaney	Oct. 1921	1,500	13	2,000	1,600.00
Henrietta Serf	Oct. 1930	1,400	3 5/12	1,500	1,400.00

[fol. 20] 2. As alleged in the petition of appeal and admitted in the answer thereto, the appellant was employed to teach in the public schools of the Town of West New York for a period of one year, beginning September 1, 1921 at an annual salary of $2300. Appellant has been continuously engaged as a teacher in the public schools of West New York during all school years since the school year 1921-1922, having taught in said schools from September 1921 until the present time. For the school year 1922-1923 the contract of appellant to teach in the public schools of West New York was renewed and the salary of appellant increased to $2450 per annum. For the school year 1923-1924 said contract was again renewed and the salary of appellant was increased to $2600 annually. For the school year 1924-1925 said contract was again renewed and the salary of appellant was increased to $2750. Since the school year 1924-1925 the contract of appellant to teach in the public schools of West New York has continued in full force and effect and for the school year 1925-1926 the salary of appellant was raised to $2900, for the school year 1926-1927 the salary of appellant was raised to $3050, for the school year 1927-1928 the salary of appellant was raised to $3200 and for the school year 1928-1929 the salary of appellant was fixed at $3200.00. The said salary of appellant remained fixed at the sum of $3200 for the school years 1929-1930, 1930-1931, 1931-1932 and 1932-1933. Appellant has been engaged as a teacher in the public schools of the Town of West New York for a period of more than three consecutive years and no written charges have ever been preferred against appellant and appellant has not been charged with or been guilty of inefficiency, incapacity, conduct unbecoming a teacher or other offenses constitut-
[fol. 21] ing just cause for the reduction of his salary or the termination of his employment.

3. By a resolution dated June 23, 1933 the Board of Education of the Town of West New York undertook to reduce the salaries of the superintendent of schools, all principals, supervisors and teachers for the school year 1933-1934. Said resolution reads as follows:

"Resolved, That between July 1, 1933, and July 1, 1934, the salaries of the superintendent of schools and of all principals, supervisors and teachers in the West New

York School system be and they are hereby reduced as follows:

All salaries from $1200 to $1999 per annum reduced ten per cent;

All salaries from $2000 to $2499 per annum reduced eleven per cent;

All salaries from $2500 to $2999 per annum reduced twelve per cent;

All salaries from $3000 to $3499 per annum reduced thirteen per cent;

All salaries from $3500 to $3999 per annum reduced fourteen per cent;

All salaries from $4000 to $5600 per annum reduced fifteen per cent;

all figures being inclusive; provided however, that the salary of any elementary school teacher shall not be reduced below the minimum of $1200 per annum, and the salary of any high school teacher shall not be reduced below the minimum of $1600 per annum.

(Sgd.) Arthur H. Einbeck.

Dated June 23, 1933."

[fol. 22] 4. By a resolution dated June 23, 1933 the Board of Education of the Town of West New York undertook to reduce for the school year 1933-1934 the salaries of the nurses named at the end of paragraph one of this stipulation to the amounts shown in said paragraph.

5. By a third resolution dated June 23, 1933 the Board of Education of the Town of West New York undertood to reduce the salaries of certain named persons, called Clerks, by said resolution. Said resolution reads as follows:

"Resolved, that between July 1, 1933 and July 1, 1934, the salaries of clerks in the West New York school system be and they are hereby reduced to the amounts set opposite their respective names below:

Pearl Rutan	$2200	per annum
Rose Millimet	1600	" "
Caroline Johansen	1600	" "
Madelyn Offerman	1200	" "
Angela Wintrich	1200	" "
Marie Martin	1200	" "

Sylvia Wilson	1200	per annum
Cathleen Bach	1200	" "
Virginia Otis	1000	" "
Helen Roth	900	" "
Marion Holm	900	" "

(Sgd.) Arthur H. Einbeck.

Dated June 23, 1933."

6. As alleged in the petition of appeal and admitted in the answer thereto, the appellant, since the passage of the resolution dated June 23, 1933, purporting to reduce the salaries of teachers, has accepted no compensation for the [fols. 23-30] school year 1933-1934 for the performance of his duties as a teacher in the public schools of West New York, and appellant has not agreed, expressly or impliedly, to the terms of said resolution dated June 23, 1933, nor to the manner in which said resolution has been applied by the Board of Education of the Town of West New York.

The foregoing stipulation is entered into as a substitute for the taking of testimony and the cause is to be submitted for determination as though the foregoing facts had been proved by qualified witnesses, each party reserving full rights to argue all questions of law which may be presented by the foregoing facts and by the petition of appeal and the answer thereto. And it is further stipulated that in case the Commissioner of Education desires further proof on any issue raised by the petition of appeal and the answer thereto, that such proof may be furnished by further stipulation or by the taking of testimony.

Dated May 9, 1934.

McCarter & English, Attorneys of Petitioner. Reinhold Hekeler, Attorney of Respondent.

[fols. 31-32] STATEMENT OF NEW JERSEY, DEPARTMENT OF PUBLIC INSTRUCTION

JAY B. PHELPS, Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, Respondent

DECISION OF COMMISSIONER OF EDUCATION

The testimony in this case is identical with that in the Askam, et al., vs. West New York Board of Education, decided this day by the Commissioner of Education, with the exception that for the school year 1933-1934 appellant has not accepted compensation for the performance of his duties as a teacher in the public schools and has not agreed expressly or impliedly to the terms of the first resolution set forth in the Askam case. Since it was held in that case that the respondent acted in accordance with its statutory authority, the fact that appellant did not accept compensation does not affect his status. For the reasons set forth in the Askam decision, this petition is dismissed.

Charles H. Elliott, Commissioner of Education.

July 18, 1934.

[fols. 33-34] STATE BOARD OF EDUCATION

JAY B. PHELPS, Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, Respondent

NOTICE OF APPEAL

To Reinhold Hekeler, Esq., Attorney of Respondent.

SIR:

Take notice, That the appellant in the above entitled cause appeals from the whole of the decision of the Commissioner of Education in said cause, which decision is dated July 18, 1934.

McCarter & English, Attorneys of Appellant.

Service of the within Notice of Appeal is hereby acknowledged this 14th day of August, 1934.

Reinhold Hekeler, Attorney of Respondent.

[fols. 35-38] STATE BOARD OF EDUCATION

JAY B. PHELPS, Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, Respondent

DECISION

The testimony in this situation was identical with that in the Askam case, just decided, with the exception that for the school year 1933-1934 the appellant, Jay B. Phelps, has not accepted compensation for the performance of his duties as a teacher in the public schools, and he has not agreed, expressly or impliedly, to the terms of the first resolution set forth in the Askam case. The Commissioner dismissed Mr. Phelps' petition on the ground stated in his opinion in the Askam case and held that the fact that Mr. Phelps did not accept compensation does not affect his status. With this we agree, and recommend that the Commissioner's decision be affirmed.

February 9, 1935.

[fol. 39] IN SUPREME COURT OF NEW JERSEY

JAY B. PHELPS, Prosecutor,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, and STATE BOARD OF EDUCATION, Defendants

REASONS.—Filed April 26, 1935

The prosecutor assigns as reasons for reversing the Decision of The State Board of Education brought up by this Writ of Certiorari the following:

1. The action of the Board of Education of the Town of West New York in reducing prosecutor's salary for the

period between July 1, 1933, and July 1, 1934, was in violation of Chapter 243 of the Laws of 1909 (the Teachers' Tenure Act).

2. The action of the Board of Education of the Town of West New York in reducing prosecutor's salary for the period between July 1, 1933, and July 1, 1934, was in violation of the terms of prosecutor's contract with said Board of Education.

3. The action of the Board of Education of the Town of West New York in reducing prosecutor's salary for the period between July 1, 1933, and July 1, 1934, is illegal, in that Chapter 12 of the Laws of 1933 authorizing Boards of Education to reduce salaries of employees, whether under tenure or not, is unconstitutional in the following [fol. 40] respects:

(a) It violates Article IV, sec. 7, par. 3 of the Constitution of New Jersey.

(b) It violates Article I, Sec. 10 of the Constitution of the United States by impairing the Obligation of Contracts.

(c) It violates Amendment XIV, Sec. 1 of the Constitution of the United States by depriving persons of property without due process of law and by denying to them the equal protection of the laws.

4. The action of the Board of Education of the Town of West New York in reducing prosecutor's salary for the period between July 1, 1933, and July 1, 1934, is illegal, in that Chapter 12 of the Laws of 1933 authorizing Boards of Education to reduce salaries of employees applies by its preamble only to school districts in which emergency exists, and no emergency has been shown to exist or to have existed in the Town of West New York.

5. The action of the Board of Education of the Town of West New York in reducing prosecutor's salary for the period between July 1, 1933, and July 1, 1934, is illegal, in that Chapter 12 of the Laws of 1933 authorizing Boards of Education to reduce salaries of employees applies by its preamble only to school districts in which emergency exists, and the said Board of Education of the Town of West New York did not inquire or determine whether an emergency

existed in said school district before attempting to reduce salaries under the provisions of said chapter.

[fols. 41-42] 6. The action of the Board of Education of the Town of West New York in reducing prosecutor's salary for the period between July 1, 1933, and July 1, 1934, is illegal, in that it violates Chapter 12 of the Laws of 1933 by discriminating among or between individuals in the same class of service.

McCarter & English, Attorneys for Prosecutor.

[File endorsement omitted.]

[fols. 43-44] In Supreme Court of New Jersey,
May Term, 1935

Nos. 248, 249

No. 248

Jay B. Phelps, Prosecutor,

v.

State Board of Education et al., Defendants

No. 249

Lucy Askam et al., Prosecutor,

v.

State Board of Education. et al., Defendants

Opinion.—Filed July 26, 1935

Argued May 10, 1935. Decided July 26, 1935

1. Chapter 12 of the Laws of 1933 (P. L., p. 24) is not unconstitutional as impairing the obligation of contracts, or as depriving a citizen of the equal protection of the laws, as applied to the prosecutors in this case.

2. The proviso in Chapter 12 of the Laws of 1933 (P. L., p. 24) forbidding discrimination among or between individuals in the same class of service is not violated by classifying teachers for purposes of salary reduction according to their former salaries.

3. The legislature by said act having declared the existence of an economic emergency requiring that certain [fol. 45] powers be given to every board of education, it was not necessary for an individual board so to adjudge before exercising the powers.

On Certiorari

Before Justices Parker, Case and Bodine

For the Prosecutors: Robert H. McCarter (Ward J. Herbert, on the brief).

For the Defendants: Raymond J. Otis.

The opinion of the court was delivered by

PARKER, J.:

These two writs of certiorari bring up decisions of the State Board of Education, affirming on appeal decisions of the State Commissioner of Education which dismissed appeals of the several prosecutors challenging a resolution of the Board of Education of West New York in Hudson County, dated June 23, 1933, which provided for certain reductions beginning July 1, 1933 in salaries of the superintendent of schools, principals, supervisors and teachers, by percentages varying according to amount of salary; also a resolution readjusting the salaries of certain named clerks at certain stated figures. The Commissioner of Education dismissed the appeals before him on July 18, 1934: the State Board affirmed on February 9, 1935.

[fol. 46] The resolution first mentioned, relating to those having the status of teachers, is founded on Chapter 12 of the Laws of 1933 (P. L., p. 24) entitled "An act respecting the salaries or compensation of officers and employees, and persons holding positions in the several school districts of this state." This act contains the following preamble:

"Whereas, due to present economic conditions, an emergency exists which requires that the board of education of every school district in this State be enabled to fix and determine, by resolution, the amount of salary or compensa-

tion to be paid to officers and employees of and persons holding positions in any such school district";

and proceeds to enact that

"The Board of Education of every school district in this State shall have full authority, by resolution, to fix and determine the salaries and compensation to be paid to officers and employees of and persons holding positions in any such school district, between the first day of July, 1933, and the first day of July, 1934, notwithstanding any such person be under tenure or not." There are certain provisos not here material, viz., that there shall be no increase of pay during the year: that rights in the pension fund remain unaffected: that the existing minimum salary of teachers of $70 per month remain unchanged: and a further proviso, relied on by prosecutors as part of their case, "that in fixing salaries or compensation, there shall be no discrimination among or between individuals in the same class of service."

[fol. 47] Section 2 provides that nothing in the act "shall be construed to affect or impair the continuity of position or employment under any tenure of office statute."

The resolution of June 23, 1933 relating to teachers reads as follows:

"Resolved, that between July 1, 1933 and July 1, 1934, the salaries of the superintendent of schools and of all principals, supervisors and teachers in the West New York School system be and they are hereby reduced as follows:

"All salaries from $1200 to $1999 per annum reduced ten per cent;

"All salaries from $2000 to $2499 per annum reduced eleven per cent;

"All salaries from $2500 to $2999 per annum reduced twelve per cent;

"All salaries from $3000 to $3499 per annum reduced thirteen per cent;

"All salaries from $3500 to $3999 per annum reduced fourteen per cent;

"All salaries from $4000 to $5600 per annum reduced fifteen per cent;

all figures being inclusive; provided, however, that the salary of any elementary school teacher shall not be reduced

below the minimum of $1200 per annum, and the salary of any high school teacher shall not be reduced below the minimum of $1600 per annum."

The other resolution of like date relates to "clerks" and and is as follows:

"Resolved, that between July 1, 1933 and July 1, 1934, the salaries of clerks in the West New York School system [fol. 48] be and they are hereby reduced to the amounts set opposite their respective names below:

"Pearl Rutan	$2200	per	annum.
"Rose Millimet	1600	"	"
"Caroline Johansen	1600	"	"
"Madelyn Offerman	1200	"	"
"Angela Wintrich	1200	"	"
"Marie Martin	1200	"	"
"Sylvia Wilson	1200	"	"
"Cathleen Bach	1200	"	"
"Virginia Otis	1000	"	"
"Helen Roth	900	"	"
'Marion Holm	900	"	"

We take up first the resolution affecting the teacher group. As to this, the two main propositions are that the act of 1933 is unconstitutional as impairing the obligation of contracts; and secondly, that the scheme of salary reductions violates the proviso in that act forbidding "discrimination among or between individuals in the same class of service."

The argument for unconstitutionality proceeds on these lines: after three years of contract service the teachers are entitled generally to indefinite tenure under the act of 1909, Chapter 243 (P. L., p. 398): that tenure is contractual, and the legislature is powerless to interfere with it, or to authorize a board of education to interfere. All the prosecutors in the teacher group are in the indefinite tenure class.

The act of 1909, relating to tenure, provides, among other things, that no teacher shall be dismissed or subjected to reduction of salary except for certain causes after charges and a trial. That established a legislative status for teach- [fol. 49] ers, but we fail to see that it established a contractual one that the legislature may not modify. If the argu-

ment now made is sound, the act of 1909 is irrepealable as to any teacher holding his position by tenure at any time thereafter. A board of education is a public body, created by the legislature, with certain powers conferred by statute. It is a municipal corporation, or at least a quasi municipal corporation, and, as such, subject to supervision and control by the legislature. The act of 1933 is in purport and effect, though not so entitled, an implied partial repealer or amendment of the tenure act of 1909, and we are clear that it was well within the power of the legislature. The status of tenure teachers, while in one sense perhaps contractual, is in essence dependent on a statute, like that of the incumbent of a statutory office, which the legislature at will may abolish, or whose emoluments it may change. See Vroom v. Board of Education, 79 N. J. Law, 46. We are clear that the legislature could repeal the act of 1909. If it could repeal it, it can modify it as thought best, and that it did by the act of 1933. It is suggested in the brief that the teachers have rights of the same standing as those of bondholders but we see no merit in this suggestion and hardly think it is made seriously.

Secondly, with regard to the claim that there is in the resolution discrimination between individuals in the same class of service because of the varying percentages of reduction based on salary limits. We are unable to perceive any such discrimination. The resolution relating to teachers divides them into six classes according to salary, the first class including those drawing salaries from $1,200 to $1,999 per annum, and so upward by steps of $500 each [fol. 50] except the last, where the limits are from $4,000 to $5,600. The higher the salary, the greater the percentage of reduction. But every one in the same class suffers the same per cent. reduction. It is true that in some cases where one salary is just over the minimum of the class, and another just under the maximum of the next class below, the first is cut to below the second; but that does not create a discrimination between individuals in the same class of service; it is simply an arithmetical result of applying a general formula. Counsel point out what is probably a clerical error touching two individuals who are apparently not parties to this proceeding. The complaint here is that the Board did not follow its own resolution, but that vagary

is not the object of attack by these writs. Again, it is said that the Board paid no attention to individual merit or demerit. Naturally, it did not, as that is expressly forbidden by the statute of 1933.

As to the resolution bearing on the clerks, counsel for respondent argues that they are not entitled under the tenure act, and claims they are not protected by the proviso in the act of 1933. But be this as it may, we concur in the view of the Commissioner of Education that the reductions are likewise by classes according to salary, the two $1,600 clerks being reduced from $2,300; the four $1,200 clerks from $1,500; the one $1,000 clerk from $1,100; the two $900 clerks being new employees. As to the two so-called teacher-clerks, we think that one holding a teacher's certificate but doing only clerical work is properly classified as a clerk. The question is what such a person is doing, not what he or she is certified as qualified to do.

Much of the voluminous brief for the prosecutors is devoted to the proposition that "There is no justification for [fol. 51] the assumption that there was in West New York at the time of the adoption of the salary resolutions, such a financial debacle as justified the passage of the resolutions." The brief treats this matter as though the Board, without so alleging in its resolutions, assumed the existence of an emergency in West New York, and as though this court must, if it can, assume such existence in order to support the resolutions. But the preamble of the statute, fully quoted above, expressly recites that "due to present economic conditions an emergency exists which requires that Boards of Education be enabled to fix and determine," etc. The argument apparently ignores this fact, viz., that the legislature itself in its preamble not only assumed, but declared, the existence of an emergency "which requires that the Board of Education of every school district in this state be enabled," etc. Language could not be broader or more definite, as a preface to the enacting clause.

The judgments and decisions of the State Board under review will be affirmed, with costs.

(Reported in 115 N. J. L. 310.)

[fol. 52] IN SUPREME COURT OF NEW JERSEY

No. 248

JAY B. PHELPS, Prosecutor,

vs.

STATE BOARD OF EDUCATION et al., Defendants

RULE OF AFFIRMANCE

The above matter having regularly come on for a hearing at the May Term, 1935, of this Court and it appearing to the court that the proceedings and orders of the Board of Education of the Town of West New York and of the State Board of Education, under review were regular and should be affirmed,

It is ordered this 10th day of October, 1935, that the writ of certiorari herein be dismissed with costs in favor of the defendants and against the prosecutor.

Entered October 10, 1935, on motion of
Reinhold Hekeler, Attorney for Defendants.

[fols. 53-54] IN SUPREME COURT OF NEW JERSEY

JAY B. PHELPS, Prosecutor,

vs.

STATE BOARD OF EDUCATION et als., Defendants

NOTICE AND GROUNDS OF APPEAL—Filed October 25, 1935

To Reinhold Hekeler, Esq., Attorney for Defendants.

SIR:

Please take notice that the Prosecutor appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in the above cause in the Supreme Court of New Jersey, on the following ground: that the New Jersey Supreme Court erred in dismissing the writ of certiorari in said cause and in giving judgment in favor of the defendants and against the prosecutor.

McCarter & English, Attorneys of Prosecutor-Appellant.

I hereby acknowledge service of the within Notice of Appeal and Grounds of Appeal this 18th day of October, 1935.

Reinhold Hekeler, Attorney for Defendants.

[fol. 55] In Court of Errors and Appeals of New Jersey

February Term, 1936

No. 35 (with 36)

Jay B. Phelps, Appellant,

—

Board of Education of the Town of West New York, N. J., et al., Respondents

Appeal from Supreme Court

Opinion—Filed May 14, 1936

Per Curiam:

The judgment under review herein should be affirmed for the reasons expressed in the opinion delivered by Mr. Justice Parker in the Supreme Court, reported in 115 N. J. Law 310.

[File endorsement omitted.]

[fol. 56] [Endorsed:] Filed Sept. 28, 1936. Fred L. Bloodgood, Clerk.

[fol. 57] In Court of Errors and Appeals of New Jersey

No. 35 (11782)

Jay B. Phelps, Appellant,

vs.

Board of Education of the Town of West New York et al., Respondents

On Appeal from Supreme Court

Rule of Affirmance—Filed May 21, 1936

The above cause having regularly come on for a hearing at the February Term, 1936, of this Court, and it appearing to this Court that the judgment entered in the above cause in the Supreme Court of New Jersey; under review, was proper in its entirety and should be affirmed.

It is Ordered this 14th day of May, 1936, that the said judgment appealed from be and the same is hereby in all things affirmed, with costs in favor of the respondents and against the appellant.

Entered June 4, 1936.

On Motion of Reinhold Hekeler, Attorney for Respondents.

[File endorsement omitted.]

[fol. 58] [Endorsed:] Filed Jun. 4, 1936. Fred L. Bloodgood, Clerk.

[fol. 59] In Supreme Court of the United States

Jay B. Phelps, Appellant,

vs.

Board of Education of the Town of West New York and State Board of Education of the State of New Jersey, Appellees

Petition for Appeal—Filed September 28, 1936

Considering himself aggrieved by the final decision of the Court of Errors and Appeals of the State of New Jersey

in the above entitled cause, the appellant therein, Jay B. Phelps, of the Town of West New York, New Jersey, hereby prays that an appeal be allowed to the Supreme Court of the United States herein and for an order fixing the amount of the bond thereon.

ASSIGNMENT OF ERRORS

Now comes the appellant above named and files herewith his petition for appeal and says that there are errors in the records and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment:

1. The New Jersey Court of Errors and Appeals erred in giving judgment affirming the judgment of the New Jersey Supreme Court, holding Chapter 12 of the New Jersey Laws of 1933 to be a constitutional act.

2. The New Jersey Court of Errors and Appeals erred in failing to render judgment in favor of said appellant.

[fol. 60] 3. The New Jersey Court of Errors and Appeals erred in failing to hold that said Chapter 12 of the New Jersey Laws of 1933, impaired the obligation of an existing contract between the appellant and the appellees in violation of Article 1, Section 10 of the Constitution of the United States.

4. The New Jersey Court of Errors and Appeals erred in failing to hold that said Chapter 12 of the New Jersey Laws of 1933, deprived the appellant of his property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

5. The New Jersey Court of Errors and Appeals erred in failing to hold that said Chapter 12 of the New Jersey Laws of 1933, denied to the appellant the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

6. The New Jersey Court of Errors and Appeals erred in holding that the action of the Board of Education of the Town of West New York in reducing appellant's salary for

the period between July 1st, 1933 and July 1st, 1934, taken under and by virtue of said Chapter 12 of the New Jersey Laws of 1933, was constitutional and not an impairment of the obligation of contracts in violation of Article 1, Section 10 of the Constitution of the United States.

7. The New Jersey Court of Errors and Appeals erred in holding that the action of the Board of Education of the Town of West New York in reducing appellant's salary for the period between July 1st, 1933 and July 1st, 1934, taken under and by virtue of said Chapter 12 of the New Jersey Laws of 1933, was constitutional and not a deprivation of property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

[fol. 61]

8. The New Jersey Court of Errors and Appeals erred in holding that the action of the Board of Education of the Town of West New York in reducing appellant's salary for the period between July 1st, 1933 and July 1st, 1934, taken under and by virtue of said Chapter 12 of the New Jersey Laws of 1933, was constitutional and not a denial of the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

PRAYER FOR REVERSAL

For which errors the appellant, Jay B. Phelps, prays that the said judgment of the New Jersey Court of Errors and Appeals, which is dated May 21, 1936 in the above entitled cause, be reviewed by the Supreme Court of the United States, and reversed, and a judgment entered in favor of the appellant and for costs.

McCarter & English, Attorneys for and of Counsel with Appellant, by Robert H. McCarter.

[fol. 62] The within petition for appeal is hereby denied because of lack of jurisdiction this 20th day of August 1936.

Luther A. Campbell, Chancellor of the State of New Jersey and President Judge of the Court of Errors and Appeals in the Last Resort in all Causes.

[File endorsement omitted.]

[fol. 63] SUPREME COURT OF UNITED STATES

JAY B. PHELPS, Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK and STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY, Appellees.

ORDER ALLOWING APPEAL—Filed September 28, 1936

The appellant in the above entitled cause, having prayed for the allowance of an appeal in said cause to the Supreme Court of the United States from the judgment entered in the New Jersey Court of Errors and Appeals in the Last Resort in all Causes on the 21st day of May, 1936, and having presented his petition for appeal, assignment of errors, prayer for reversal and statement, pursuant to the statutes and to the rules of the Supreme Court of the United States in such case made and provided;

It is Ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the New Jersey Court of Errors and Appeals in the Last Resort in all Causes, as provided by law, and it is further Ordered that the Clerk of the New Jersey Supreme Court, to which Court the record in said cause has been remitted, shall prepare and certify a transcript of the record, proceedings and judgment in said cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within forty days of this date.

And it is further Ordered that security for costs on ap-
[fol. 64] peal be fixed in the sum of $100.00.

Dated this 21st day of August, 1936.

Owen J. Roberts, Associate Justice of the Supreme Court of the United States.

Entered September 28, 1936, on motion of McCarter & English, Attorneys of Appellant.

[fols. 65-76] [File endorsement omitted]

[fols. 77-78] IN SUPREME COURT OF NEW JERSEY

[Seal of the Court]

WRIT OF CERTIORARI

NEW JERSEY, ss:

The State of New Jersey to the Board of Education of the Town of West New York and the State Board of Education, Greeting:

We being willing for certain reasons to be certified of a decision made on February 9, 1935 by the State Board of Education of the State of New Jersey on an appeal to said State Board of Education from a decision of the Commissioner of Education of the State of New Jersey, dated July 18, 1934, in the matter of Lucy Askam, et als., appellants, and Board of Education of the Town of West New York, respondent; do command you that the said decision, together with all things touching and concerning the same, as fully and entirely as before you they remain, to our Justices of our Supreme Court of Judicature at Trenton, on the 7th day of May, 1935, you certify and send, together with this writ; that therein may be done what of right and according to the laws of this State should be done.

Witness, Thomas J. Brogan, Esquire, Chief Justice of our Supreme Court, at Trenton, this 23rd day of April, 1935.

Fred L. Bloodgood, Clerk. McCarter & English, Attorneys.

I allow this writ. Let it be sealed.

Dated April 22, 1935.

Charles W. Parker, J. S. C.

[fols. 79-80] STATE OF NEW JERSEY, DEPARTMENT OF PUBLIC INSTRUCTION

LUCY ASKAM, ELIZABETH V. BORNEMAN, ALICE BREWTON, Inez A. Becker, Jennie P. Buonaccorsi, Edith Brown, Helen F. Clohosy, Genevieve Creighton, Elvira Chiricosta, Edward Carroll, Margaret Chaplin, Mary E. Chase, Mary I. Clark, Ethel Creamer, Mrs. Viola Donovan, George DeLamater, Geneva Dobbs, John Edgar Dransfield, Walter Eickmann, Elsie H. Eckardt, Esther J. Ekegren, Ida B. Forbes, Bertha Godfrey, Abe Golden, Clara Greene, Mae H. Girsham, Olga Grossmann, Emma Hubert, Esther E. Hanna, Alice Halfpenny, Ruth Humphrey, Lillian Hunt, Frances C. Hangley, Minnie C. Holthusen, Carrie Hauschild, Mrs. Reintraut Jonsson, Harriet Jochem, Mrs. Caroline Johansen, Rose Jacobs, Herman F. Kraus, Grace Kaiser, Evelyn Klees, Alice Luckings, Wilma Lindlof, Ruth Lindstrom, Samuel Litzenberg, Josephine Logioio, Audrey Lundell, Edna Moreau, Harriet Mac Ewan, Agnes D. McDermott, Maude Meyers, Dorothy L. Michaels, Margaret Morris, Carrie Morris, Mary Nolan, Saidie Nicoll, Gustave Pohl, Gertrude Reiley, Mary Robinson, Thomas Roop, Mary Ross, Maud Rafter, Lillian Rank, Alysse Reiley, Gertrude Reineman, Alida Russell, Peter Sottung, Elizabeth Steinel, Vaughn D. Stocking, Ida M. Smith, Marjorie Stein, Alice Swinston, Ellen Smith, Wilson W. Staver, Johnetta Thorne, Jennie Thorp, Carolyn Trott, Bernice Young, Carlos A. Woodworth, Gilbert C. Wagner, John White, Elvira Wiese, Jessie Welch, Adelaide Whelen, Loretta V. White, Nell L. Winter, Florence Eldred, Willis S. Eshleman, John McGrath, Vincent McGuinness, Robert Rollins, Jr., Edna Stone and Viola Neubert, Appellants,

VS.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, Respondent

PETITION OF APPEAL

The above named appellants hereby petition the Commissioner of Education of the State of New Jersey to re-[fol. 81] view and set aside the resolution adopted by the

Board of Education of the Town of West New York on June 23, 1933, which resolution purports to reduce the salary of each of the above named appellants for the period between July 1, 1933 and July 1, 1934. A true copy of said resolution is hereto annexed as Schedule A. The appellants set forth that said resolution was unlawfully adopted and is illegal and say that:

1. Appellants are all teachers or principals of the public schools of the Town of West New York and each of appellants has served a period of employment of more than 3 consecutive years in the public school system of said Town and each of the appellants is now employed in the public school system of said Town.

2. None of the appellants have been guilty of inefficiency, incapacity, conduct unbecoming a teacher or any other offence constituting just cause for dismissal or reduction of salary, and no written charges have been preferred against any of the appellants for inefficiency, incapacity, conduct unbecoming a teacher or other offence constituting just cause for dismissal or reduction of salary.

3. The aforesaid resolution of the Board of Education of the Town of West New York dated June 23, 1933 purports to reduce the salary of each of appellants for the school year 1933-1934. The appellants allege and show that said resolution is in violation of the provisions of an act entitled "An Act to establish a thorough and efficient system of free public schools and to provide for the maintenance, support and management thereof," approved October 19, 1903, and the several amendments thereof and supplements thereto, in that, among other things, each of the appellants is entitled [fol. 82] to retain his or her employment during good behavior and efficiency, without reduction of salary or compensation. Appellants further allege and show that said resolution is an illegal and improper interference with the terms of their contracts of employment and is without force and effect as a modification of said contracts.

4. The appellants, Lucy Askam, Helen F. Clohosy, Abe Golden, Mary Robinson, Thomas Roop and Gilbert Wagner, by the terms of their respective contracts of employment as teachers in the public schools of West New York became entitled to salaries of $3200 for the school year 1932-1933.

The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellants by 13% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellants have received compensation for only two weeks and have each been paid the sum of $139.20 as said compensation for said two weeks.

5. The appellant Elizabeth V. Borneman by the terms of her contract of employment as a principal in the public schools of West New York became entitled to a salary of $3900 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 14% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $167.70 as said compensation for said two weeks.

[fol. 83] 6. The appellant Alice Brewton by the terms of her contract of employment as a teacher in the public schools of West New York became entitled to a salary of $2450 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 11% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $109.02 as said compensation for said two weeks.

7. The appellants, Inez A. Becker, Edith Brown, Mary I. Clark, Ethel Creamer, Ida B. Forbes, Lillian Hunt, Minnie C. Holthusen, Carrie Hauschild, Margaret Morris, Carrie Morris, Maud Rafter, Alida Russell, Ida M. Smith, Alice Swinston, Johnetta Thorne, Jennie Thorp, Jessie Welch, Loretta V. White and Nell L. Winter, by the terms of their respective contracts of employment as teachers in the public schools of West New York became entitled to salaries of $2500 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellants by 12% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934.

Since the opening of the public schools of West New York for the school year 1933-1934 said appellants have received compensation for only two weeks and have each been paid the sum of $110.00 as said compensation for said two weeks.

8. The appellants, Jennie P. Buonaccorsi, Walter Eickmann, Olga Grossmann and Josephine Logioio, by the terms of their respective contracts of employment as teachers in [fol. 84] the public schools of West New York became entitled to salaries of $2075 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellants by 11% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellants have received compensation for only two weeks and have each been paid the sum of $92.33 as said compensation for said two weeks.

9. The appellant, Genevieve Creighton, by the terms of her contract of employment as a teacher in the public schools of West New York became entitled to a salary of $2825 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 12% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $124.30 as said compensation for said two weeks.

10. The appellant, Elvira Chiricosta, by the terms of her contract of employment as a teacher in the public schools of West New York became entitled to a salary of $3100 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 13% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $134.85 as said compensation for said two weeks.

[fol. 85] 11. The appellants, Edward Carroll, George DeLamater, Bertha Godfrey, Emma Hubert, Esther E. Han.

na, Herman F. Krause, Alice Luckings, Gustaye Pohl, Mary Ross, Willis S. Eshleman and Edna Stone, by the terms of their respective contracts of employment as teachers in the public schools of West New York became entitled to salaries of $3400 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellants by 13% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellants have received compensation for only two weeks and have each been paid the sum of $147.90 as said compensation for said two weeks.

12. The appellants, Margaret Chaplin and Dorothy L. Michaels, by the terms of their respective contracts of employment as teachers in the public schools of West New York became entitled to salaries of $2150 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellants by 11% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellants have received compensation for only two weeks and have each been paid the sum of $95.67 as said compensation for said two weeks.

13. The appellants, Mary E. Chase, Geneva Dobbs, Mae H. Girsham, Frances C. Hangley, Rose Jacobs, Mary Nolan, Saidie Nicoll, Lillian Rank and Ellen Smith, by the terms of their respective contracts of employment as teachers in [fol. 86] the public schools of West New York became entitled to salaries of $2300 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellants by 11% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellants have received compensation for only two weeks and have each been paid the sum of $102.35 as said compensation for said two weeks.

14. The appellant, Caroline Johansen, by the terms of her contract of employment as a teacher in the public schools

of West New York became entitled to a salary of $2300 for the school year 1932-1933. The aforesaid resolution purports to reduce said salary by 11% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $80 as and for her full compensation for said two weeks.

15. The appellant, Mrs. Viola Donovan, by the terms of her contract of employment as a teacher in the public schools of West New York became entitled to a salary of $2875 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 12% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation [fol. 87] for only two weeks and has been paid the sum of $126.50 as said compensation for said two weeks.

16. The appellant, John Edgar Dransfield, by the terms of his contract of employment as a principal in the public schools of West New York became entitled to a salary of $4000 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 15% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $170 as said compensation for said two weeks.

17. The appellant, Elsie H. Eckardt, by the terms of her contract of employment as a teacher in the public schools of West New York became entitled to a salary of $2025 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 11% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $90.11 as said compensation for said two weeks.

18. The appellants, Esther J. Ekegren and Gertrude Reineman, by the terms of their respective contracts of employment as teachers in the public schools of West New York became entitled to salaries of $1950 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellants by 10% for the period between July 1, 1933 and July 1, [fol. 88] 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellants have received compensation for only two weeks and have each been paid the sum of $87.75 as said compensation for said two weeks.

19. The appellant, Clara Greene, by the terms of her contract of employment as a teacher in the public schools of West New York became entitled to a salary of $2400 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 11% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $106.80 as said compensation for said two weeks.

20. The appellants, Alice Halfpenny and Samuel Litzenberg, by the terms of their respective contracts of employment as teachers in the public schools of West New York became entitled to salaries of $2525 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellants by 12% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellants have received compensation for only two weeks and have each been paid the sum of $111.10 as said compensation for said two weeks.

21. The appellant, Mrs. Reintrout Jonsson, —the terms of her contract of employment as a teacher in the public [fol. 89] schools of West New York became entitled to a salary of $2750 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 12% for the period between July 1, 1933 and July 1, 1934, being the school year

1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $121.00 as said compensation for said two weeks.

22. The appellants, Harriet Jochem and Viola Neubert, by the terms of their respective contracts of employment as teachers in the public schools of West New York became entitled to salaries of $1400 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellants by 10% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellants have received compensation for only two weeks and have each been paid the sum of $63.00 as said compensation for said two weeks.

23. The appellants, Grace Kaiser and Maude Meyers, by the terms of their respective contracts of employment as teachers in the public schools of West New York became entitled to salaries of $2225 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellants by 11% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 [fol. 90] said appellants have received compensation for only two weeks and have each been paid the sum of $99.01 as said compensation for said two weeks.

24. The appellant, Evelyn Klees, by the terms of her contract of employment as a teacher in the public schools of West New York became entitled to a salary of $2200 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 11% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $97.90 as said compensation for said two weeks.

25. The appellants, Wilma Lindlof and Ruth Humphrey, by the terms of their respective contract of employment as

teachers in the public schools of West New York — entitled to salaries of $2000 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellants by 11% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellants have received compensation for only two weeks and have each been paid the sum of $89.00 as said compensation for said two weeks.

26. The appellant, Ruth Lindstrom, by the terms of her contract of employment as a teacher in the public schools of West New York became entitled to a salary of $1600 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said ap- [fol. 91] pellant by 10% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $72.00 as said compensation for said two weeks.

27. The appellant, Audrey Lundell, by the terms of her contract of employment as a teacher in the public schools of West New York became entitled to a salary of $2250 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 11% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $100.12 as said compensation for said two weeks.

28. The appellant, Edna Moreau, by the terms of her contract of employment as a teacher in the public schools of West New York became entitled to a salary of $2775 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 12% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compen-

sation for only two weeks and has been paid the sum of $122.10 as said compensation for said two weeks.

29. The appellant, Harriet MacEwan, by the terms of her [fol. 92] contract of employment as a teacher in the public schools of West New York became entitled to a salary of $2475 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 11% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $110.13 as said compensation for said two weeks.

30. The appellant, Agnes D. McDermott, by the terms of her contract of employment as a teacher in the public schools of West New York became entitled to a salary of $2125 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 11% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $94.56 as said compensation for said two weeks.

31. The appellant, Gertrude Reiley, by the terms of her contract of employment as a teacher in the public schools of West New York became entitled to a salary of $3025 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 13% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensa- [fol. 93] tion for only two weeks and has been paid the sum of $131.58 as said compensation for said two weeks.

32. The appellant, Alysse Reiley, by the terms of her contract of employment as a teacher in the public schools of West New York became entitled to a salary of $2375 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 11% for the period between July 1,

1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $105.68 as said compensation for said two weeks.

33. The appellant, Peter Sottung, by the terms of his contract of employment as a teacher in the public schools of West New York became entitled to a salary of $3175 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 13% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $138.11 as said compensation for said two weeks.

34. The appellants, Elizabeth Steinel and John McGrath, by the terms of their respective contracts of employment as teachers in the public schools of West New York became entitled to salaries of $2125 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellants by 11% for the [fol. 94] period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellants have received compensation for only two weeks and have each been paid the sum of $94.56 as said compensation for said two weeks.

35. The appellants, Vaughn D. Stocking and Wilson W. Staver, by the terms of their respective contracts of employment as principals in the public schools of West New York became entitled to salaries of $4300 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellants by 15% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellants have received compensation for only two weeks and have each been paid the sum of $182.75 as said compensation for said two weeks.

36. The appellant, Marjorie Stein, by the terms of her contract of employment as a teacher in the public schools

of West New York became entitled to a salary of $2100 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 11% for the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $93.45 as said compensation for said two weeks.

37. The appellant, Carolyn Trott, by the terms of her contract of employment as a teacher in the public schools [fol. 95] of West New York became entitled to a salary of $1600 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 10% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $72.00 as said compensation for said two weeks.

37. The appellant, Bernice Young, by the terms of her contract of employment as a teacher in the public schools of West New York became entitled to a salary of $1975 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 10% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $88.87 as said compensation for said two weeks.

38. The appellant, Carlos A. Woodworth, by the terms of his contract of employment as a principal in the public schools of West New York became entitled to a salary of $5000 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 15% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant [fol. 96] has received compensation for only two weeks and has been paid the sum of $212.50 as said compensation for said two weeks.

39. The appellant, John White, by the terms of his contract of employment as a teacher in the public schools of West New York became entitled to a salary of $1900 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 10% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $85.50 as said compensation for said two weeks.

40. The appellant, Elvira Wiese, by the terms of her contract of employment as a teacher in the public schools of West New York became entitled to a salary of $1800 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 10% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $81.00 as said compensation for said two weeks.

41. The appellant, Adelaide Whelan, by the terms of her contract of employment as a teacher in the public schools of West New York became entitled to a salary of $1450 for the school year $1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the com-[fol. 97] pensation of said appellant by 10% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $65.25 as said compensation for said two weeks.

42. The appellant, Florence Eldred, by the terms of her contract of employment as a teacher in the public schools of West New York became entitled to a salary of $3050 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 13% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934.

Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $132.67 as said compensation for said two weeks.

43. The appellant, Vincent McGuinness, by the terms of his contract of employment as a teacher in the public schools of West New York became entitled to a salary of $2975 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 12% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $130.90 as said compensation for said two weeks.

[fol. 98] 44. The appellant, Robert Rollins, Jr., by the terms of his contract of employment as a teacher in the public schools of West New York became entitled to a salary of $2950 for the school year 1932-1933. The aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellant by 12% for the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934. Since the opening of the public schools of West New York for the school year 1933-1934 said appellant has received compensation for only two weeks and has been paid the sum of $129.80 as said compensation for said two weeks.

45. Appellants are informed and believe that said resolution dated June 23, 1933 was adopted by the Board of Education of the Town of West New York in reliance on "An Act respecting the salaries or compensation of officers and employees of and persons holding positions in the several school districts of this State," approved February 4, 1933. Appellants allege and show that said Act is unconstitutional and without force and effect insofar as it purports to authorize a reduction of the salary of each of the appellants without regard to the aforesaid right of each of said appellants during good behavior and efficiency to continue his or her employment without reduction of salary, and insofar as said Act purports to authorize a reduction of the salary of each of the appellants without regard to the contract of employment under which each

of the appellants has served and is serving as a teacher or principal in the public schools of West New York.

46. Appellants further allege and show that said resolution dated June 23, 1933 does not comply with the provisions of the aforesaid Act approved February 4, 1933 in [fol. 99] that said resolution discriminates among and between individuals in the same class of service in the public schools of West New York. Appellants further allege and show that the respondent Board of Education in applying said resolution has discriminated among and between individuals in the same class of service in the public schools of West New York.

47. Appellants further allege and show that said resolution dated June 23, 1933 is illegal and improper in that it purports to reduce the compensation of appellants for the period between July 1, 1933 and July 1, 1934 to a greater extent than the salaries or compensation of other employees of the Town of West New York have been reduced during the same period or portions thereof.

48. Since the passage of said resolution dated June 23, 1933 each of the appellants has accepted such compensation as has been paid for the school year 1933-1934 under protest and on account of the true salary of each of the appellants. None of the appellants has agreed expressly or impliedly to the terms of said resolution dated June 23, 1933 nor to the manner in which said resolution has been applied and carried out by the Board of Education of the Town of West New York.

Appellants therefore pray that an order may be made by the Commissioner of Education of the State of New Jersey setting aside and declaring invalid and void the action of the Board of Education of the Town of West New York in attempting to reduce the compensation of the appellants and each of them for the school year 1933-1934, which action of said Board of Education is embodied in [fol. 100] its resolution dated June 23, 1933. And appellants pray for such other relief as may be necessary and proper in the premises.

McCarter & English, Attorneys of Appellants.

Schedule "A" omitted. Printed side page 7, ante.

[fols. 101-102]. *Duly sworn to by Robert H. McCarter. Jurat omitted in printing.*

[fol. 103] STATE OF NEW JERSEY, DEPARTMENT OF PUBLIC INSTRUCTION

LUCY ASKAM et al.

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, Respondent

ANSWER—Filed January 15, 1934

The Board of Education of the Town of West New York for answer to the petition of appellants herein respectfully says:

[fol. 104] 1. It admits the allegations contained in paragraph 1 of the petition, except as to Appellant Mrs. Caroline Johansen, and as to her it denies that she is a teacher in the public schools of West New York.

2. It admits the allegations contained in paragraph 2, and in paragraphs 4 to 13, inclusive, and in paragraphs 15 to 44, inclusive, of the petition.

3. It denies the allegations contained in paragraphs 3, 46, 47, and 48, and asks proof of the allegations contained in paragraph 48.

4. It denies the inference contained in the beginning of paragraph 14 that the Appellant Caroline Johansen was employed as a teacher and that her salary was affected by the resolution cited. It admits the allegations contained in the last sentence of said paragraph and states that her salary was reduced from $2,300 to $1,600.

5. It admits the allegation contained in the first sentence of paragraph 45 of the petition, but denies the balance of the allegations contained in said paragraph.

6. For further answer respondent respectfully alleges and shows that the Appellant Mrs. Caroline Johansen never performed any duties as a teacher in the public schools of West New York, all of her work in such schools having been purely clerical in the office of a principal; that she accepted the maximum salary provided by respondent by resolution for office clerks holding certificates to teach; and that neither her position nor her salary ever was or now

is protected by the Act of October 19, 1903, its amendments or supplements, referred to in appellant's petition.

[fols. 105-106] 7. For further answer respondent respectfully alleges and shows that the Appellant Mrs. Viola Donovan performed no duties as a teacher prior to September, 1932; that before that time her duties had been purely clerical in the offices of school principals; and that, inasmuch as she had not been engaged as a teacher for three consecutive years prior to the reduction in salary complained of, she never was nor is now protected either in position or salary by the Act of October 19, 1903, its amendments or supplements, referred to in appellant's petition.

Respondent therefore prays that the petition be dismissed as to all the appellants.

The Board of Education of the Town of West New York in the County of Hudson, by Reinhold Hekeler, Its Attorney.

Duly sworn to by Leo V. Roth. Jurat omitted in printing.

[fols. 107-108] STATE OF NEW JERSEY, DEPARTMENT OF PUBLIC INSTRUCTION

LUCY ASKAM et als., Appellants,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, Respondent

STIPULATION OF FACTS—Filed June 14, 1934

It is hereby stipulated by and between the respective parties to the above entitled cause that said cause be submitted for determination upon such facts contained in the petition of appeal as are admitted by the answer of the respondent to said petition and upon the additional facts stated in the following paragraphs:

1. Reference is hereby made to paragraph one of the Stipulation of Facts dated May 9, 1934 in the case of Jay B. Phelps, appellant, against Board of Education of the Town of West New York, respondent; and it is hereby

stipulated and agreed that paragraph one of said Stipulation is to be considered as paragraph one of this Stipulation as though repeated at length herein.

2. It is agreed that all of the appellants except Caroline Johansen are teachers or principals in the public schools of the Town of West New York and that each of the appellants has served a period of employment of more than three [fol. 109] consecutive years in the public school system of the Town of West New York and is now employed in the public school system of that town.

3. None of the appellants has been guilty of inefficiency, incapacity, conduct unbecoming a teacher or any other offence constituting just cause for dismissal or reduction of salary, and no written charges have been preferred against any of the appellants for inefficiency, incapacity, conduct unbecoming a teacher or other offence constituting just cause for dismissal or reduction of salary.

4. By a resolution dated June 23, 1933 the Board of Education of the Town of West New York purported to reduce the salaries of the superintendent of schools and of all principals, supervisors and teachers in the West New York school system for the period between July 1, 1933 and July 1, 1934. Said resolution reads as follows:

"Resolved, that between July 1, 1933 and July 1, 1934, the salaries of the superintendent of schools and of all principals, supervisors and teachers in the West New York School system be and they are hereby reduced as follows:

All salaries from $1200 to $1999 per annum reduced ten per cent;

All salaries from $2000 to $2499 per annum reduced eleven per cent;

All salaries from $2500 to $2999 per annum reduced twelve per cent;

All salaries from $3000 to $3499 per annum reduced thirteen per cent;

All salaries from $3500 to $3999 per annum reduced fourteen per cent;

All salaries from $4000 to $5600 per annum reduced fifteen per cent;

[fol. 110] all figures being inclusive; provided, however, that the salary of any elementary school teacher shall not

be reduced below the minimum of $1200 per annum, and the salary of any high school teacher shall not be reduced below the minimum of $1600 per annum."

5. The following appellants, by the terms of their respective contracts of employment as teachers in the public schools of West New York, became entitled to the following salaries for the school year 1932-1933 and the aforesaid resolution dated June 23, 1933 purports to reduce the compensation of said appellants by the following percentages during the period between July 1, 1933 and July 1, 1934, being the school year 1933-1934:

Name of Appellant.	1932-1933 salary.	Percentage of reduction.
Lucy Askam	$3200	13%
Helen F. Clohosy	"	"
Abe Golden	"	"
Mary Robinson	"	"
Thomas Roop	"	"
Gilbert Wagner	"	"
Elizabeth V. Borneman	3900	14
Alice Brewton	2450	11
Inez A. Becker	2500	12
Edith Brown	"	"
Mary I. Clark	"	"
Ethel Creamer	"	"
Ida B. Forbes	"	"
Lillian Hunt	"	"
Minnie C. Holthusen	"	"
Carrie Hauschild	"	"
Margaret Morris	"	"
Carrie Morris	"	"
Maud Rafter	"	"
Alida Russell	"	"
[fol. 111] Ida M. Smith	"	"
Alice Swinston	"	"
Johnetta Thorne	"	"
Jennie Thorp	"	"
Jessie Welch	"	"
Loretta V. White	"	"
Nell L. Winter	"	"
Jennie P. Buonaccorsi	2075	11
Walter Eickmann	"	"
Olga Grossman	"	"
Josephine Logioio	"	"

Name of Appellant.	1932-1933 salary.	Percentage of reduction.
Genevieve Creighton	2825	12
Elvira Chiricosta	3100	13
Edward Carroll	3400	13
George DeLamater	"	"
Bertha Godfrey	"	"
Emma Hubert	"	"
Esther E. Hanna	"	"
Herman F. Krause	"	"
Alice Luckings	"	"
Gustave Pohl	"	"
Mary Ross	"	"
Willis S. Eshleman	"	"
Edna Stone	"	"
Margaret Chaplin	2150	11
Dorothy L. Michaels	"	"
Mary E. Chase	2300	11
Geneva Dobbs	"	"
Mae H. Girsham	"	"
Frances C. Hangley	"	"
Rose Jacobs	"	"
Mary Nolan	"	"
Saidie Nicoll	"	"
Lillian Rank	"	"
Ellen Smith	"	"
Mrs. Viola Donovan	2875	12
[fol. 112] John Edgar Dransfield	4000	15
Elsie H. Eckardt	2025	11
Esther J. Ekegren	1950	10
Gertrude Reineman	"	"
Clara Greene	2400	11
Alice Halfpenny	2525	12
Samuel Litzenberg	"	"
Mrs. Reintraut Jonsson	2750	12
Harriet Jocham	1400	10
Viola Neubert	"	"
Grace Kaiser	2225	11
Maude Meyers	"	"
Evelyn Klees	2200	11
Wilma Lindlof	2000	11
Ruth Humphrey	"	"
Ruth Lindstrom	1600	10

Name of Appellant.	1932-1933 salary.	Percentage of reduction.
Audrey Lundell	2250	11
Edna Moreau	2775	12
Harriet MacEwan	2475	11
Agnes D. McDermott	2125	11
Gertrude Reiley	3025	13
Alysse Reiley	2375	11
Peter Sottung	3175	13
Elizabeth Steinel	2125	11
John McGrath	"	"
Vaughn D. Stocking	4300	15
Wilson W. Staver	"	"
Marjorie Stein	2100	11
Carolyn Trott	1600	10
Bernice Young	1975	10
Carlos A. Woodworth	5000	15
John White	1900	10
Elvira Wiese	1800	10
Adelaide Whelan	1450	10
Florence Eldred	3050	13
Vincent McGuinness	2975	12
Robert Rollins, Jr.	2950	12

[fol. 113] 6. It is alleged in paragraph one of the Petition of Appeal that the appellants are all teachers or principals in the public schools of the Town of West New York. It is admitted in the answer to the Petition of Appeal that this is true except as to the appellant, Caroline Johansen, and as to her, it is denied that she is a teacher in the public schools of West New York. At the present time Caroline Johansen is employed in the capacity commonly described as that of teacher-clerk. She is the holder of a permanent elementary certificate issued to her by the State of New Jersey in January, 1919, and was appointed as a teacher in the public schools of West New York in November, 1918. She taught regularly as a grade teacher in those schools from November 1, 1918, to January, 1920. She was then granted six months' leave of absence because of illness. She was assigned to the office of School #3 as a clerk on September 1, 1920, and has ever since continued to act at that school in that capacity generally described as teacher-clerk. A brief outline of her duties follows: the usual cleri-

cal work in the office of the principal of public school #3; checking attendance records and assisting the principal generally in the administrative work. She does no teaching. Her initial salary of $700 per year was gradually increased to $1435 for the school year 1921-1922. During each of the next five school years she received a salary increase of $100 in accordance with the salary schedule fixed by the Board of Education of the Town of West New York. During the school year 1927-1928 and 1928-1929 she was given extra salary increases because of college courses successfully pursued. For the school year 1929-1930 her salary was fixed at the maximum of $2300 under a resolution of [fol. 114] the Board of Education of the Town of West New York reading as follows:

"Resolved that the action of this Board at its meeting of May 10, 1927, in fixing the maximum salary of office clerks holding certificates to teach at the sum of $2,150 per annum be and the same hereby is rescinded and that such maximum salary be and the same hereby is fixed at the sum of $2,300 per annum."

The salary of Caroline Johansen remained at $2,300 per year until the Board of Education undertook to reduce it to $1,600 for the school year 1933-1934, by a resolution dated June 23, 1933, and reading as follows:

"Resolved, that between July 1, 1933, and July 1, 1934, the salaries of clerks in the West New York School system be and they are hereby reduced to the amounts set opposite their respective names below:

Pearl Rutan	$2200	per annum.
Rose Millimet	1600	" "
Caroline Johansen	1600	" "
Madelyn Offerman	1200	" "
Angela Wintrich	1200	" "
Marie Martin	1200	" "
Sylvia Wilson	1200	" "
Cathleen Bach	1200	" "
Virginia Otis	1000	" "
Helen Roth	900	" "
Marion Holm	900	" "

As a result of the employment of Caroline Johansen in the public schools of the Town of West New York, the Board of Education of the Town of West New York has regularly

been allowed and has regularly accepted $200 per year from [fol. 115] the State School Tax moneys. The use of the expression "teacher-clerk," in referring to Caroline Johansen, is not meant to indicate that she is engaged in active teaching but is used merely as the general description of her position as an employe of the West New York school system who holds a teacher's certificate and who is engaged in performing the duties described in this paragraph.

7. As to the appellant Viola Donovan, it is alleged in the answer to the Petition of Appeal that she performed no duties as a teacher prior to September 1932. The petition of appeal alleges that she is a teacher and has served a period of employment of more than three consecutive years in the public schools of the Town of West New York and that by virtue of "An Act to establish a thorough and efficient system of free public schools and to provide for the maintenance, support and management thereof" approved October 19, 1903, and the several amendments thereof and supplements thereto, she is entitled to retain her employment during good behavior and efficiency without reduction of salary or compensation. The answer to the petition of appeal denies that she is protected by the provisions of that act. The particulars of her employment in the schools of the Town of West New York are as follows: She is the holder of a permanent stenography, typing and bookkeeping certificate; she was first employed in the schools of West New York in May, 1927 and was assigned to the office of the high school as a clerk beginning in September, 1927; between September, 1927 and September, 1932 she acted in the capacity generally described as teacher-clerk; in September, 1932, she was assigned to active teaching which she has been [fol. 116] doing ever since. A brief outline of the duties of Viola Donovan prior to September, 1932 is as follows: the usual clerical work in the office of the principal of the high school; meeting parents and solving the problems not requiring the attention of the principal; consulting with nurses on charitable cases and assisting the principal generally in his administrative duties. Prior to 1928 Viola Donovan did some incidental teaching but between 1928 and September, 1932 she did no teaching.

8. In the resolution dated June 23, 1933, which is set forth in paragraph 6 above, there appears the name Rose Milli-

met. She is not one of the appellants in this cause but she is the holder of a teacher's certificate and the fact concerning her employment in the public schools of West New York is as follows: she is the holder of a permanent elementary certificate issued to her by the State of New Jersey in 1915; she was appointed as a teacher in the public schools of West New York on July 26, 1915; she taught regularly as a grade teacher in those schools from 1915 until the end of the school year 1918-1919; she acted as a teacher-clerk during the school year 1919-1920; she taught as a grade teacher during the school year 1920-1921; she has acted in the capacity generally described as teacher-clerk from September, 1921, up to the present time. A brief outline of her duties follows: the usual clerical work in the office of the Vice-principal of the high school; checking attendance records; assisting students in arranging schedules; consulting with nurses on charitable cases; and assisting the Vice-principal generally in the administrative work of the Vice-principal. She does no teaching. Her initial salary of $560 per year was gradually increased to $1,840 for the school year [fol. 117] 1923-1924. During each of the next four school years she received a salary increase of $100 in accordance with the salary schedule fixed by the Board of Education of the Town of West New York. During the same period the persons actually teaching in the grade schools were likewise granted salary increases of $100 per year. During the school year 1928-1929 Rose Millimet's salary was increased to the maximum of $2,300 under a resolution of the Board of Education of the Town of West New York reading as follows:

"Resolved that the action of this Board at its meeting of May 10, 1927, in fixing the maximum salary of office clerks holding certificates to teach at the sum of $2,150 per annum be and the same hereby is rescinded and that such maximum salary be and the same hereby is fixed at the sum of $2,300 per annum."

The salary of Rose Millimet remained at $2,300 per annum until the Board of Education undertook to reduce it to $1,600 for the school year 1933-1934 by the resolution of June 23, 1933 which is set forth in paragraph 6 of this stipulation. As a result of the employment of Rose Millimet in the public schools of the Town of West New York, the Board of Educa-

tion of the Town of West New York has regularly been allowed and has regularly accepted $200 per year from the State School Tax moneys. The use of the expression "teacher-clerk," in referring to Rose Millimet, is not meant to indicate that she is engaged in active teaching but is used merely as the general description of her position as an employe of the West New York school system who holds a teacher's certificate and who is engaged in performing [fol. 118] the duties described in this paragraph.

9. Caroline Johansen is assigned to the office of the principal of Public School #3. Rose Milliment is assigned to the office of Vice-principal of the High School. Prior to September, 1932, Viola Donovan was assigned to the office of the principal of the High School. The employees of the Board of Education of the Town of West New York, who are assigned as clerks to the offices of the other principals, and the employee who is now assigned as clerk to the office of the principal of the High School, are not the holders of teachers' certificates although they do work of the same general nature as that done by Rose Millimet and Caroline Johansen and of the same general nature as that formerly done by Viola Donovan, and they do such work in a satisfactory manner.

10. Since the passage of the aforesaid resolutions dated June 23, 1933, none of the appellants has agreed expressly to the terms of said resolutions nor to the manner in which said resolutions have been applied and carried out by the Board of Education of the Town of West New York. However, all of the appellants, except Caroline Johansen, accepted and cashed salary checks when tendered by the Board of Education. These salary checks were based on the aforesaid reduced salary schedule. Caroline Johansen accepted such salary checks but did not cash them until after it had been stipulated by the attorneys for all parties to this action that she may cash such checks without affecting whatever rights she might have established by her not cashing such checks immediately or at least soon after their receipt by her. In case it is deemed [fols. 119-120] material to show the exact nature of such protests as were made by the appellants against the terms and application of said resolutions, it is stipulated and agreed that proof concerning such protests may be furnished by further stipulation or by the taking of testimony.

The foregoing stipulation is entered into as a substitute for the taking of testimony and the cause is to be submitted for determination as though the foregoing facts had been proved by qualified witnesses, each party reserving full rights to argue all questions of law which may be presented by the foregoing facts and by the petition of appeal and the answer thereto. And it is further stipulated that in case the Commissioner of Education desires further proof on any issue raised by the petition of appeal and the answer thereto, that such proof may be furnished by further stipulation or by the taking of testimony.

Dated June 13th, 1934.

McCarter & English, Attorneys of Petitioners. Reinhold Hekeler, Attorney of Respondent.

[fol. 121] STATE OF NEW JERSEY, DEPARTMENT OF PUBLIC INSTRUCTION

LUCY ASKAM et als., Appellants,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, Respondent

DECISION OF COMMISSIONER OF EDUCATION

The respondent board of education on June 23, 1933, adopted resolutions as follows:

"Resolved, that between July 1, 1933, and July 1, 1934, the salaries of the superintendent of schools and of all principals, supervisors and teachers in the West New York School system be and they are hereby reduced as follows:

All salaries from $1200 to $1999 per annum reduced ten per cent;

All salaries from $2000 to $2499 per annum reduced eleven per cent;

All salaries from $2500 to $2999 per annum reduced twelve per cent;

All salaries from $3000 to $3499 per annum reduced thirteen per cent;

All salaries from $3500 to $3999 per annum reduced fourteen per cent;

All salaries from $4000 to $5600 per annum reduced fifteen per cent;

all figures being inclusive; provided, however, that the salary of any elementary school teacher shall not be reduced below the minimum of $1200 per annum, and the [fol. 122] salary of any high school teacher shall not be reduced below the minimum of $1600 per annum."

"Resolved, that between July 1, 1933, and July 1, 1934, the salaries of clerks in the West New York School system be and they are hereby reduced to the amounts set opposite their respective names below:

*Pearl Rutan	$2200	per	annum.
Rose Millimet	1600	"	"
Caroline Johansen	1600	"	"
Madelyn Offerman	1200	"	"
Angela Wintrich	1200	"	"
Marie Martin	1200	"	"
Sylvia Wilson	1200	"	"
Cathleen Bach	1200	"	"
Virginia Otis	1000	"	"
Helen Roth	900	"	"
Marion Holm	900	"	"

* Clerk assigned to superintendent and board jointly.

The salaries of teachers protected by the Tenure of Office Act were reduced by the percentage set forth in the first resolution. The clerks, whose salaries were fixed by the second resolution at $1600, were reduced from $2300; those at $1200 from $1500; and the one at $1000 from $1100. The two at $900 were new employees. The percentage reductions in the three decreased salary groups were approximately 30%, 20%, and 9%, respectively. The reduced salaries were accepted by appellants without formal complaint until the filing of the petition on December 16, 1933. The original stipulation of facts did not come to the Commissioner until May 9, 1934, and this was supplemented by others on June 4th and 13th.

[fol. 123] Counsel for appellants holds that the action of the board is illegal under the following contentions:

(1) Chapter 12, P. L. 1933 is unconstitutional as it interferes with the contractual rights of appellants.

(2) Even if the act were constitutional, the resolutions of June 23, 1933, are discriminatory and, therefore, in violation of the act.

The State Board of Education in the case of Albertson vs. Glassboro, decided December 1, 1924, held:

"Neither * * * the Commissioner nor this Board is empowered to declare any act passed by the Legislature to be contrary to the constitution * * *."

Since, in accordance with that decision, it is not the prerogative of the Commissioner to pass upon the constitutionality of the statute, there remains only to be decided whether the respondent could legally reduce salaries in any class of service on a graduated percentage basis, and whether it had a right to reduce the salaries of teacher-clerks in a greater amount than those of teachers.

Chapter 12, P. L. 1933, provides in relation to the authority of boards of education to reduce salaries of employees or persons holding positions in any school district:

"That in fixing salaries or compensation there shall be no discrimination among or between individuals in the same class of service."

[fol. 124] This provision indicates a legislative purpose of avoiding arbitrary discrimination in any class or group of employees which would lead either to an attempt to dismiss certain individuals without resorting to the methods prescribed in the Tenure of Office Act, or to the creation of dissatisfaction among members of a group. It is the opinion of the Commissioner that the Legislature, while thus protecting individual employees, gave broad discretion as to salary reductions in relation to classes or groups. The board of education has a right to consider the living wage of employees in determining salary reductions and it is not discrimination, within the meaning of Chapter 12, P. L. 1933, to increase the reductions by 1% on each graduated amount in excess of the minimum of $1200 fixed by

the resolution. Salary reductions, therefore, may be made on a flat percentage basis applicable to all employees of a class or in proportion to the salary of such employees. The statute recognizes different classes of service. Although they are not specifically set forth, there appear to be three distinct groups of employees of a board; namely: professional (including teachers, principals, supervisors, etc.); non-professional (including clerks, secretaries, custodians, janitors, etc.); and employees whose work partakes of the two preceding groups (including teacher-clerks, teacher-librarians, etc.). While subdivisions may be made by a board of education the resolutions in this case have application to these three major groups only. The first resolution applies to the professional group, the second includes clerks belonging to the second group, and by inference through the stipulations, includes teacher-clerks belonging to the third group. In the first resolution the board estab- [fols. 125-126] lished a graduated percentage reduction of salaries and in the second made a proportionate reduction in the salaries of clerical employees, some of whom are termed "teacher-clerks" because they hold teachers' certificates. Clerks without teachers certificates have no tenure protection, and the Commissioner is unable to find any decisions defining the status of teacher-clerks in reference to the Tenure of Office Act. In the present instance, it does not appear to be necessary to decide whether teacher-clerks have tenure since, even if protected, the service rendered is different from that of regular teachers. A board of education is vested with discretion to evaluate the importance of clerical work in relation to the strictly professional work of classroom teachers, and to reduce the salaries of the former employees to a greater extent than those devoting practically their full time to teaching. The West New York Board of Education acted within its statutory authority when it adopted the above recited resolutions. The appeal is dismissed.

Dated July 18, 1934.

Charles H. Elliott, Commissioner of Education.

[fols. 127-128] STATE BOARD OF EDUCATION

LUCY ASKAM et als., Appellants,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, Respondent

NOTICE OF APPEAL

To Reinhold Hekeler, Esq., Attorney of Respondent.

SIR:

Take notice, That the appellants in the above entitled cause appeals from the whole of the decision of the Commissioner of Education in said cause, which decision is dated July 18, 1934.

McCarter & English, Attorneys of Appellants.

Service of the within Notice of Appeal is hereby acknowledged this 14th day of August, 1934.

Reinhold Hekeler, Attorney of Respondent.

[fol. 129] STATE BOARD OF EDUCATION

LUCY ASKAM et als., Appellants,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, Respondent

DECISION

The appellants, ninety-four in number, are all teachers, principals, supervisors, or clerks of the public schools of the Town of West New York. Each of the mis alleged to have been employed for more than three consecutive years and therefore to have tenure of office. On June 23, 1933, the Board of Education of West New York adopted resolutions whereby the salaries of principals, supervisors, teachers, and clerks in the system were reduced by certain specified percentages, or, as to the clerks, to certain specified amounts. The resolutions are set forth in full in the Commission's opinion.

The board's action was taken in pursuance of and reliance upon Chapter 12 of the Public Laws of 1933, which provided, in brief, that boards of education "shall have full authority, by resolution, to fix and determine the salaries and compensation to be paid to officers and employees of and persons holding positions in any such school district," notwithstanding they might "be under tenure or not."

Appellants do not deny that this statute, in terms, made lawful the reduction of salaries, notwithstanding the Tenure [fol. 130] of Office Act, but they maintain that the statute is unconstitutional, and this presents the first question to be determined on this appeal.

This board has heretofore taken the position that it is not empowered to declare an act of the Legislature to be unconstitutional. It was so held by this Board on December 1, 1924, in the case of Albertson vs. Glassboro, which is cited by the Commissioner in his opinion. Counsel for the appellants in their brief urge that our position in this respect was mistaken; that the Commissioner, in exercising his judicial functions in determining controversies arising under the School Laws, and this Board, in exercising the appellate jurisdiction conferred upon it by law with respect to such controversies, are tribunals which outrank other inferior courts of the State which, in their decisions, have declared acts of the Legislature to be contrary to the Constitution.

This question has therefore been carefully investigated and studied with the result that we believe that the position heretofore taken by the Board was possibly unduly modest and that the Board may have the right to declare the statute in question to be a violation of the Constitution of the State. But even if this Board has such power, this is not a case, in the opinion of the Law Committee, where it should be exercised.

It is true that in some courts and by some writers on the subject, it has been said that where a judge of an inferior court believes that a statute is without doubt contrary to the constitution, he should so hold, and act accordingly.

However, even the highest courts are always hesitant to declare legislative acts unconstitutional. The foremost textbook on this subject, possibly, contains, the following:

[fol. 131] "The fundamental law of the State is in question, as well as the correctness of legislative action; and

considerations of courtesy, as well as the importance of the question involved, should lead the court to decline to act at all''

except after the most careful and deliberate consideration, thus indicating the constraint with which even the highest courts of the land approach question of constitutionality.

It is true, as stated by the same authority, that ''this is a rule of propriety, not of constitutional obligation;'' but even Chief Justice Marshall himself declined to pass upon the constitutionality of an important act of Congress until a full bench of the Supreme Court was available. (See 1 Cooley's Constitutional Limitations, (8th Ed.) 335 et seq.; citing 8 Pet. 118).

One of the most eminent and scholarly judges who ever sat in the Surrogate's Courts of New York State, and whose opinions commanded the highest respect, once declared himself as follows:

''The transcendant power of declaring an act of the Legislature unconstitutional should never in my opinion be assumed by a court of first instance, except possibly in rare cases involving life or liberty, and where the invalidity of the legislative act is apparent on its face. The exercise of a judicial power to declare acts of the legislature void should, I think, be reserved to the graver courts of the State in solemn session in banc, or held for the final review of such great questions.''

In re Thornburgh, 72 Misc. Rep. 619.

[fols. 132-134] It has also been said that

''Undoubtedly when the highest courts in the land hesitate to declare a law unconstitutional, and allow much weight to the legislative judgment, the inferior courts should be still more reluctant to exercise this power, and a becoming modesty would at least be expected of those judicial officers who have not been trained to the investigation of legal and constitutional questions.''

(1 Cooley's Constitutional Limitations, (8th Ed.) p. 337, note.)

We are convinced that even should the high courts of the State instruct this Board that it has the power, in the exercise of its judicial functions, to pass on the consti-

tutionality of acts of the Legislature, that power should never be exercised unless the violation of the constitution is clear and beyond question. In our opinion, this is not such a case and we therefore believe that this Board should decline to pass on the constitutional question raised by the appellants.

One further question remains to be decided. The act of the Legislature in question (Chapter 12, P. L. 1933) provides "that in fixing salaries or compensation (pursuant to the act) there shall be no discrimination among or between individuals in the same class of service."

The appellants contend that the action of the board of education in this case violated the provision above quoted. The Commissioner, after careful discussion, holds that the board did not discriminate among individuals in the same class of service and that the statute was not violated in that respect. With this conclusion we agree.

It is therefore recommended that the opinion of the Commissioner be affirmed.

February 9, 1935.

[fol. 135] In Supreme Court of New Jersey

Lucy Askam et als., Prosecutors,

vs.

Board of Education of the Town of West New York, and State Board of Education

Reasons—Filed April 26, 1935

The prosecutors assign as reasons for reversing the Decision of The State Board of Education brought up by this Writ of Certiorari the following:

1. The action of the Board of Education of the Town of West New York in reducing prosecutors' salaries for the period between July 1, 1933, and July 1, 1934, was in violation of Chapter 243 of the Laws of 1909 (the Teachers' Tenure Act).

[fol. 136] 2. The action of the Board of Education of the Town of West New York in reducing prosecutors' salaries for the period between July 1, 1933, and July 1, 1934, was

in violation of the terms of prosecutors' contracts with said Board of Education.

3. The action of the Board of Education of the Town of West New York in reducing prosecutors' salaries for the period between July 1, 1933, and July 1, 1934, is illegal, in that Chapter 12 of the Laws of 1933 authorizing Boards of Education to reduce salaries of employees, whether under tenure or not, is unconstitutional in the following respects:

(a) It violates Article IV, sec. 7, par. 3 of the Constitution of New Jersey.

(b) It violates Article I, Sec. 10 of the Constitution of the United States by impairing the Obligation of Contracts.

(c) It violates Amendment XIV, Sec. 1 of the Constitution of the United States by depriving persons of property without due process of law and by denying to them the equal protection of the laws.

4. The action of the Board of Education of the Town of West New York in reducing prosecutors' salaries for the period between July 1, 1933, and July 1, 1934, is illegal, in that Chapter 12 of the Laws of 1933 authorizing Boards of Education to reduce salaries of employees applies by its preamble only to school districts in which emergency exists, and no emergency has been shown to exist or to have existed in the Town of West New York.

[fol. 137] 5. The action of the Board of Education of the Town of West New York in reducing prosecutors' salaries for the period between July 1, 1933, and July 1, 1934, is illegal, in that Chapter 12 of the Laws of 1933 authorizing Boards of Education to reduce salaries of employees applies by its preamble only to school districts in which emergency exists, and the said Board of Education of the Town of West New York did not inquire or determine whether an emergency existed in said school district before attempting to reduce salaries under the provisions of said Chapter.

6. The action of the Board of Education of the Town of West New York in reducing prosecutors' salaries for the period between July 1, 1933, and July 1, 1934, is illegal, in that it violates Chapter 12 of the Laws of 1933 by discrim-

inating among or between individuals in the same class of service.

McCarter & English, Attorneys for Prosecutors.

[File endorsement omitted.]

[fols. 138-146] Opinion of the Supreme Court—Filed July 26, 1935, omitted. Printed side page 43, ante.

[fols. 147-148] In Supreme Court of New Jersey

Lucy Askam et al., Prosecutor-,

vs.

State Board of Education et al., Defendants

Rule of Affirmance

The above matter having regularly come on for a hearing at the May Term, 1935, of this Court and it appearing to the court that the proceedings and orders of the Board of Education of the Town of West New York and of the State Board of Education, under review were regular and should be affirmed,

It is ordered this 10th day of October, 1935, that the writ of certiorari herein be dismissed with costs in favor of the defendants and against the prosecutor.

Entered October 10, 1935, on motion of

Reinhold Hekeler, Attorney for Defendants.

[fol. 149] In Supreme Court of New Jersey

Lucy Askam et al., Prosecutors,

vs.

State Board of Education et al., Defendants

Notice and Grounds of Appeal—Filed October 25, 1935

To Reinhold Hekeler, Esq., Attorney for Defendants.

Sir:

Please take notice that the Prosecutors appeal to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in the above cause in the Supreme Court of New Jersey, on the following ground: that the New Jersey Supreme Court erred in dismissing the writ of certiorari in said cause and in giving judgment in favor of the defendants and against the prosecutors.

McCarter & English, Attorneys of Prosecutors-Appellants.

I hereby acknowledge service of the within Notice of Appeal and Grounds of Appeal, this 18th day of October, 1935.

Reinhold Hekeler, Attorney of Defendants.

[fol. 150] In Court of Errors and Appeals of New Jersey, February Term, 1936

No. 36 (With 35)

Lucy Askam et al., Appellants,

—

Board of Education of the Town of West New York, N. J., et al., Respondents

Appeal from Supreme Court

Opinion—Filed May 14, 1936

Per Curiam:

The judgment under review herein should be affirmed for the reasons expressed in the opinion delivered by Mr.

Justice Parker in the Supreme Court, reported in 115 N. J. Law 310.

[File endorsement omitted.]

[fol. 151] [Endorsed:] Filed Sep. 28, 1936. Fred L. Bloodgood, Clerk.

[fol. 152] In Court of Errors and Appeals of New Jersey

No. 36 (11783)

Lucy Askam et als., Appellants,

vs.

Board of Education of the Town of West New York et al., Respondents

On Appeal from Supreme Court

Rule of Affirmance—Filed May 21, 1936

The above cause having regularly come on for a hearing at the February Term, 1936, of this Court, and it appearing to this Court that the judgment entered in the above cause in the Supreme Court of New Jersey, under review, was proper in its entirety and should be affirmed,

It is Ordered this 14th day of May, 1936, that the said judgment appealed from be and the same is hereby in all things affirmed, with costs in favor of the respondents and against the appellants.

Entered June 4, 1936.

On motion of Reinhold Hekeler, Attorney for Respondents.

[File endorsement omitted.]

[fol. 153] [Endorsed:] Filed Jun. 4, 1936. Fred L. Bloodgood, Clerk.

[fol. 154] SUPREME COURT OF THE UNITED STATES

LUCY ASKAM et als., Appellants,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK and State Board of Education of the State of New Jersey, Appellees

PETITION FOR APPEAL—Filed September 28, 1936

Considering themselves aggrieved by the final decision of the Court of Errors and Appeals of the State of New Jersey in the above-entitled cause, the appellants therein, Lucy Askam, Elizabeth V. Borneman, Alice Brewton, Inez A. Becker, Jennie P. Buonaccorsi, Edith Brown, Helen F. Clohosy, Genevieve Creighton, Elvira Chiricosta, Edward Carroll, Margaret Chaplin, Mary E. Chase, Mary I. Clark, Ethel Creamer, Mrs. Viola Donovan, George DeLamater, Geneva Dobbs, John Edgar Dransfield, Walter Eickmann, Elsie H. Eckardt, Esther J. Ekegren, Ida B. Forbes, Bertha Godfrey, Abe Golden, Clara Greene, Mae H. Girsham, Olga Grossmann, Emma Hubert, Esther E. Hanna, Alice Halfpenny, Ruth Humphrey, Lillian Hunt, Frances C. Hangley, Minnie C. Holthusen, Carrie Hauschild, Mrs. Reintraut Jonsson, Harriet Jochem, Mrs. Caroline Johansen, Rose Jacobs, Herman F. Krause, Grace Kaiser, Evelyn Klees, Alice Luckings, Wilma Lindlof, Ruth Lindstrom, Samuel Litzenberg, Josephine Logioio, Audrey Lundell, Edna Moreau, Harriet MacEwan, Agnes D. McDermott, Maude Meyers, Dorothy L. Michaels, Margaret Norris, Carrie Morris, Mary Nolan, Saidie Nicoll, Gustave Pohl, Gertrude Reiley, Mary Robinson, Thomas Roop, Mary Ross, Maud Rafter, Lillian Rank, Alysse Reiley, Gertrude Reineman, Alida Russell, Peter Sottung, Elizabeth Steinel, Vaughn D. Stocking, Ida M. Smith, Marjorie Stein, Alice Swinston, Ellen Smith, Wilson W. Staver, Johnetta [fol. 155] Thorne, Jennie Thorp, Carolyn Trott, Bernice Young, Carlos A. Woodworth, Gilbert C. Wagner, John White, Elvira Wiese, Jessie Welch, Adelaide Whelan, Loretta V. White, Nell L. Winter, Florence Eldred, Willis S. Eshleman, John McGrath, Vincent McGuinness, Robert Rollins, Jr., Edna Stone and Viola Neubert, hereby pray that an appeal be allowed to the Supreme Court of the

United States herein and for an order fixing the amount of the bond thereon.

Assignment of Errors

Now comes the appellants above named and file herewith their petition for appeal and say that there are errors in the records and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States, make the following assignment:

1. The New Jersey Court of Errors and Appeals erred in giving judgment affirming the judgment of the two Jersey Supreme Court, holding Chapter 12 of the New Jersey Laws of 1933 to be a constitutional act.

2. The New Jersey Court of Errors and Appeals erred in failing to render judgment in favor of said appellants.

3. The New Jersey Court of Errors and Appeals erred in failing to hold that said Chapter 12 of the New Jersey Laws of 1933, impaired the obligation of an existing contract between the appellants and the appellees in violation of Article 1, Section 10 of the Constitution of the United States.

4. The New Jersey Court of Errors and Appeals erred [fol. 156] in failing to hold that said Chapter 12 of the New Jersey Laws of 1933, deprived the appellants of their property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

5. The New Jersey Court of Errors and Appeals erred in failing to hold that said Chapter 12 of the New Jersey Laws of 1933, denied to the appellants the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

6. The New Jersey Court of Errors and Appeals erred in holding that the action of the Board of Education of the Town of West New York in reducing appellants' salaries for the period between July 1st, 1933 and July 1st, 1934, taken under and by virtue of said Chapter 12 of the New Jersey Laws of 1933, was constitutional and not an

impairment of the obligation of contracts in violation of Article 1, Section 10 of the Constitution of the United States.

7. The New Jersey Court of Errors and Appeals erred in holding that the action of the Board of Education of the Town of West New York in reducing appellants' salaries for the period between July 1st, 1933 and July 1st, 1934, taken under and by virtue of said Chapter 12 of the New Jersey Laws of 1933, was constitutional and not a deprivation of property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

8. The New Jersey Court of Errors and Appeals erred in holding that the action of the Board of Education of the Town of West New York in reducing appellants' salaries [fol. 157] for the period between July 1st, 1933 and July 1st, 1934, taken under and by virtue of said Chapter 12 of the New Jersey Laws of 1933, was constitutional and not a denial of the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

PRAYER FOR REVERSAL

For which errors the said appellants pray that the said judgment of the New Jersey Court of Errors and Appeals, which is dated May 21, 1936 in the above entitled cause, be reviewed by the Supreme Court of the United States, and reversed, and a judgment entered in favor of the said appellants and for costs.

McCarter & English, Attorneys for and of Counsel with Appellants, by Robert H. McCarter.

[fol. 158] The within Petition for Appeal is hereby denied because of lack of jurisdiction this 20th day of August, 1936.

Luther A. Campbell, Chancellor of the State of New Jersey and President Judge of the Court of Errors and Appeals in the Last Resort in All Causes.

[File endorsement omitted.]

[fol. 159] SUPREME COURT OF THE UNITED STATES

LUCY ASKAM et als., Appellants

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK and State Board of Education of the State of New Jersey, Appellees

ORDER ALLOWING APPEAL—Filed September 28, 1936

The appellants in the above entitled cause, having prayed for the allowance of an appeal in said cause to the Supreme Court of the United States from the judgment entered in the New Jersey Court of Errors and Appeals in the Last Resort in all Causes on the 21st day of May, 1936, and having presented their petition for appeal, assignment of errors, prayer for reversal and statement, pursuant to the statutes and to the rules of the Supreme Court of the United States in such case made and provided;

It is Ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the New Jersey Court of Errors and Appeals in the Last Resort in all Causes, as provided by law, and it is further Ordered that the Clerk of the New Jersey Supreme Court, to which Court the record in said cause has been remitted, shall prepare and certify a transcript of the record, proceedings and judgment in said cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within forty days of this date.

And it is further Ordered that security for costs on ap-
[fol. 160] peal be fixed in the sum of $100.00.

Dated this 21st day of August, 1936.

Owen J. Roberts, Associate Justice of the Supreme Court of the United States.

Entered September 28, 1936.

On motion of McCarter & English, Attorneys of Appellants.

[fols. 161-172] [File endorsement omitted.]

[fols. 173-174] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. 454.

ORDER ENLARGING TIME—Filed October 10, 1936

Application being made and good cause being shown, it is hereby Ordered on this 30th day of September, 1936, that the time of the appellant to docket the above entitled case and file the record thereof is hereby enlarged to and including October 10th, 1936.

Owen J. Roberts, Associate Justice of the United States Supreme Court.

[fol. 175] [File endorsement omitted]

[fols. 176-177] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. 455

ORDER ENLARGING TIME—Filed October 10, 1936

Application being made and good cause being shown, it is hereby Ordered on this 30th day of September, 1936, that the time of the appellants to docket the above entitled case and file the record thereof is hereby enlarged to and including October 10th, 1936.

Owen J. Roberts, Associate Justice of the United States Supreme Court.

[fol. 178] [File endorsement omitted]

[fol. 179] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. 454

STATEMENT OF POINTS TO BE RELIED UPON AND PARTS OF RECORD TO BE PRINTED—Filed October 14, 1936

Now comes the above-named appellant, pursuant to paragraph 9 of Rule 13 of the Rules of this Court, and states

that the points upon which he intends to rely in this Court in this case are as follows:

Point I. Chapter 12 of the New Jersey Laws of 1933 (P. L. 1933, page 24), approved February 4, 1933, is unconstitutional and void as repugnant to Article 1, Section 10, of the Constitution of the United States, in that it impairs the obligation of an existing contract of the appellant.

Point II. The aforesaid Statute of the State of New Jersey is unconstitutional and void as repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the appellant of his property without due process of law.

Point III. The said Statute of the State of New Jersey is unconstitutional and repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it denies the appellant the equal protection of the laws.

[fols. 180-181] Point IV. The New Jersey Court of Errors and Appeals erred in deciding in favor of the validity of the aforesaid Statute of the State of New Jersey.

And the appellant further states that only the following parts of the record, as filed in this Court, need be printed for the consideration of the case:

Petition of appeal filed with the New Jersey Department of Public Instruction and addressed to the Commissioner of Education, together with Schedule A thereto annexed;

Answer to the aforesaid petition of appeal;

Stipulation of facts filed with the Department of Public Instruction of the State of New Jersey and dated May 9, 1934;

Decision of the Commissioner of Education of the State of New Jersey;

Notice of appeal to New Jersey State Board of Education;

Decision of the New Jersey State Board of Education;

Writ of Certiorari issued out of New Jersey Supreme Court;

Reasons on Writ of Certiorari;

Opinion of the New Jersey Supreme Court (a single opinion having been filed for this case and the companion case of Lucy Askam, et als. vs. State Board of Education

and Board of Education of the Town of West New York);

Rule of affirmance on the opinion of the New Jersey Supreme Court, entered Oetober 10, 1935;

Notice of appeal to New Jersey Court of Errors and Appeals and ground of appeal;

Opinion of the New Jersey Court of Errors and Appeals;

Rule of affirmance entered on the opinion of the New Jersey Court of Errors and Appeals;

Petition for appeal to United States Supreme Court and assignment of errors;

Order allowing appeal.

Robert H. McCarter, Counsel for Appellant.

[fol. 182] [File endorsement omitted]

[fol. 183] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. 455

STATEMENT OF POINTS TO BE RELIED UPON AND PARTS OF RECORD TO BE PRINTED—Filed October 14, 1936

Now come the appellants in the above entitled cause, pursuant to paragraph 9 of Rule 13 of the Rules of this Court, and state that the points upon which they intend to rely in this Court are as follows:

Point I. Chapter 12 of the New Jersey Laws of 1933 (P. L. 1933, page 24), aproved February 4, 1933, is unconstitutional and void as repugnant to Article 1, Section 10, of the Constitution of the United States, in that it impairs the obligations of existing contracts of the appellants.

Point II. The aforesaid Statute of the State of New Jersey is unconstitutional and void as repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the appellants of their property without due process of law.

Point III. The said Statute of the State of New Jersey is unconstitutional and repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States

in that it denies the appellants the equal protection of the [fols. 184-185] laws.

Point IV. The New Jersey Court of Errors and Appeals erred in deciding in favor of the validity of the aforesaid Statute of the State of New Jersey.

And the appellants further state that only the following parts of the record, as filed in this Court, need be printed for the consideration of the case:

Petition of appeal filed with the New Jersey Department of Public Instruction and addressed to the Commissioner of Education, together with Schedule A thereto annexed;

Answer to the aforesaid petition of appeal;

Stipulation of facts filed with the Department of Public Instruction of the State of New Jersey and dated June 13, 1934;

Decision of the Commissioner of Education of the State of New Jersey;

Notice of appeal to New Jersey State Board of Education;

Decision of the New Jersey State Board of Education;

Writ of Certiorari issued out of New Jersey Supreme Court;

Reasons on Writ of Certiorari;

Opinion of the New Jersey Supreme Court (a single opinion having been filed for this case and the companion case of Jay B. Phelps vs. State Board of Education and Board of Education of the Town of West New York);

Rule of affirmance on the opinion of the New Jersey Supreme Court, entered October 10, 1935;

Notice of appeal to New Jersey Court of Errors and Appeals and ground of appeal;

Opinion of the New Jersey Court of Errors and Appeals;

Rule of affirmance entered on the opinion of the New Jersey Court of Errors and Appeals;

Petition for appeal to United States Supreme Court and assignment of errors;

Order allowing appeal.

Robert H. McCarter, Counsel for Appellants.

[fol. 186] [File endorsement omitted]

[fols. 187 188] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. 454, No. 455

STIPULATION AS TO PRINTING RECORD Filed October 20, 1936

It is hereby stipulated and agreed by and between counsel for the above named appellants and counsel for the above named appellees that the only parts of the records in these cases which need be printed are those named in the statements heretofore filed, and that the same may be printed under one cover.

Dated October 19th, 1936.

Robert H. McCarter, Counsel for Appellants. Saul Nemser, Counsel for Appellees.

[fol. 189] [File endorsement omitted]

Endorsed on cover: File No. 40,994. New Jersey Court of Errors and Appeals. Term No. 454. Jay B. Phelps, appellant, vs. Board of Education of the Town of West New York and State Board of Education of the State of New Jersey. Filed October 10, 1936. Term No. 454, O. T., 1936.

Endorsed on cover: File No. 40,995. New Jersey Court of Errors and Appeals. Term No. 455. Lucy Askam et al., appellants, vs. Board of Education of the Town of West New York and State Board of Education of the State of New Jersey. Filed October 10, 1936. Term Nos. 454, O. T., 1936, 455, O. T., 1936.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 454

JAY B. PHELPS,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK AND STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY,

Appellees.

STATEMENT PURSUANT TO RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

This case is one in which the validity of a statute of the State of New Jersey, to wit, Chapter 12 of the New Jersey Laws of 1933, approved February 4, 1933, is drawn in question upon the ground that the said Statute is repugnant to Article 1, Section 10 of the Constitution of the United States, and also repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States. The final decision of the Court of Errors and Appeals in the last resort in all causes in the State of New Jersey, the highest court of said State in which a decision in the above entitled cause could be had, is in favor of the validity of said Statute. Therefore, in accordance with Rule 46,

Paragraph 2, of the Rules of the Supreme Court of the United States (28 U. S. C. A.), the petitioner respectfully shows that this case is one in which under the legislation in force when the act of January 31, 1928 (45 Stat. 54), as amended by the act of April 26, 1928 (45 Stat. 466), was passed, to wit, under Section 237(a) of the Judicial Code (28 U. S. C. A., Section 344), a review could be had in the Supreme Court of the United States on writ of error.

As stated above, the Statute of New Jersey, the validity of which is involved in this case, is Chapter 12 of the New Jersey Laws of 1933 (P. L. 1933, page 24), which Statute reads as follows:

> "AN ACT respecting the salaries or compensation of officers and employees of and persons holding positions in the several school districts of this State.
>
> WHEREAS, due to present economic conditions, an emergency exists which requires that the board of education of every school district in this State be enabled to fix and determine, by resolution, the amount of salary or compensation to be paid to officers and employees of and persons holding positions in any such school district; therefore,
>
> BE IT ENACTED BY THE SENATE AND GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY:
>
> 1. The board of education of every school district in this State shall have full authority, by resolution, to fix and determine the salaries and compensation to be paid to officers and employees of and persons holding positions in any such school district, between the first day of July, one thousand nine hundred and thirty-three, and the first day of July, one thousand nine hundred and thirty-four, notwithstanding any such person be under tenure or not; *Provided, However,* that no salary or compensation of any officer or employee of or person holding a position in any school district shall be increased between the first day of July, one thousand nine hundred and thirty-three, and the first;

day of July, one thousand nine hundred and thirty-four; *and Provided, Further,* that if any such person be a member of the Teachers' Pension and Annuity Fund of the State of New Jersey, or any employees' pension fund, such person may continue to pay, or cause to be paid, into such pension fund the same amount as if such salary or compensation had not been changed, and upon the death or retirement of such member, he or his beneficiary shall be entitled to the same benefits as if his salary or compensation had not been changed; *and Provided, Further,* that in fixing salaries or compensation there shall be no discrimination among or between individuals in the same class of service; *Provided, However,* that the existing minimum salary of teachers of seventy dollars per month shall not be changed.

2. Nothing in this act contained shall be construed to affect or impair the continuity of position or employment under any tenure of office statute.

3. This act shall take effect immediately.

Approved February 4, 1933."

Judgment in this case was entered by the New Jersey Court of Errors and Appeals on May 21, 1936, and the petition for appeal, which this statement accompanies, is being presented on August 20th, 1936.

The foregoing statute has by its terms the effect of modifying Chapter 243 of the New Jersey Laws of 1909 (P. L. 1909, p. 398). That Chapter provides in part:

"No principal at teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons making the same, and filed with the secretary or clerk of the board of education having charge of the school in which the service is being rendered, and after the

charge shall have been examined into and found true in fact by said board of education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing."

* * * * * * *

"Nothing herein contained shall be held to limit the right of any school board to reduce the number of principals or teachers employed in any school district when such reduction shall be due to a natural diminution of the number of pupils in said school district; and provided further, that the service of any principal or teacher may be terminated without charge or trial who is not the holder of a proper teacher's certificate in full force and effect."

The appellant in the present case is a teacher who was employed for more than three consecutive years in the school district of the Town of West New York prior to the passage of Chapter 12 of the Laws of 1933 (*supra*). In reliance upon Chapter 12 of the Laws of 1933 the Board of Education of the Town of West New York undertook, by resolution, to reduce the salaries of its employes, including the salary of the appellant. The appellant thereupon instituted proceedings to test the legality of such action, contending before all of the tribunals below, and contending here, that when he began his fourth year of teaching, Chapter 243 of the New Jersey Laws of 1909 (*supra*) entered into and became a part of his contract of employment and that the attempt of the New Jersey Legislature to modify that contract by Chapter 12 of the Laws of 1933 (*supra*) is unconstitutional.

The Federal questions here sought to be reviewed were raised and argued in all of the tribunals of the State of New Jersey passing upon this case. The case was presented in the first instance to the Commissioner of Education of the State of New Jersey pursuant to the New Jer-

sey School Law (4 Comp. Stat. p. 4727, Sec. 10). This was done by petition of appeal alleging, among other things, that Chapter 12 of the New Jersey Laws of 1933, (*supra*), was unconstitutional. In the brief submitted to the Commissioner, specific reference was made to and argument based on the contract clause of the United States Constitution (Article 1, Section 10) and Section 1 of the Fourteenth Amendment as well as the New Jersey Constitution. The Commissioner refused to pass upon the constitutional questions raised upon the ground that he had no jurisdiction to do so, saying in his decision,

> "The State Board of Education in the case of *Albertson* v. *Glassboro*, decided December 1, 1924, held: 'Neither * * * the Commissioner nor this Board is empowered to declare any act passed by the Legislature to be contrary to the Constitution * * *.'"

An appeal was then taken to the New Jersey State Board of Education pursuant to the School Law (4 Comp. Stat. p. 4727, Sec. 10). This was done merely by notice of appeal, no grounds of appeal or assignment of errors being necessary. Before the State Board the same provisions of the United States Constitution were referred to and used as a basis of argument against the constitutionality of the statute in question, but the State Board in its decision adopted the same course followed by the Commissioner and refused to pass upon the question of constitutionality. The next step was the allowance of a writ of certiorari by the New Jersey Supreme Court.

The questions presented to that Court were defined by the reasons filed in support of the writ. These reasons are set forth at page 81 of the State Of Case presented to the New Jersey Court of Errors and Appeals. Reason #3 reads as follows:

> "3. The action of the Board of Education of the Town of West New York in reducing prosecutor's

salary for the period between July 1, 1933, and July 1, 1934, is illegal, in that Chapter 12 of the Laws of 1933 authorizing Boards of Education to reduce salaries of employees, whether under tenure or not, is unconstitutional in the following respects:

(a) It violates Article IV, sec. 7, par. 3 of the Constitution of New Jersey.

(b) It violates Article I, sec. 10 of the Constitution of the United States by impairing the Obligation of Contracts.

(c) It violates Amendment XIV, Sec. 1 of the Constitution of the United States by depriving persons of property without due process of law and by denying to them the equal protection of the laws."

The constitutional questions thus defined by reason #3 were actually argued before the New Jersey Supreme Court. That Court held the statute constitutional. A copy of the opinion is hereto appended. On appeal to the New Jersey Court of Errors and Appeals it was also argued that the statute was unconstitutional under the contract clause of the United States Constitution and under Section 1 of the Fourteenth Amendment. After considering this argument the Court of Errors and Appeals affirmed the Supreme Court and adopted its opinion. The grounds of appeal before the Court of Errors and Appeals made no mention of the constitutional question because of the well settled rule of New Jersey practice that on appeal from a judgment entered in the Supreme Court, where that Court sat as a reviewing court, the only correct assignment of error is that the Supreme Court erred in reversing or affirming. On such an assignment, reliance may be had upon the errors assigned in the Supreme Court. *Kleinert* v. *Hutchinson,* 98 N. J. L. 831, 121 Atl. 742. That practice was followed in the present case and, as stated, the constitutional questions were argued fully before the Court of

Errors and Appeal as well as before the Supreme Court and the other tribunals.

The opinion of the New Jersey Supreme Court which is appended hereto, applies not only to the present case but also to the companion case of *Askam et als.* v. *Board of Education of the Town of West New York et al.*, the two cases having been argued together. The only opinion filed by the Court of Errors and Appeals was reported in 116 N. J. L. 412, and reads as follows:

> "The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Parker in the Supreme Court."

On the basis of the foregoing brief history of the case, it is submitted that at every step the validity of the New Jersey Statute (Chapter 12, Laws of 1933) was called in question on the ground of its being repugnant to the Constitution of the United States and, the decision being in favor of the statute's validity, an appeal should be allowed under Section 237(a) of the Judicial Code (28 U. S. C. A. 344 (a)), as modified by the act of January 31, 1928 (28 U. S. C. A., Sec. 861a). The Federal question was presented for decision and its decision was necessary to the determination of the cause. Although the opinion of the New Jersey Supreme Court (which was adopted by the Court of Errors and Appeals) does not expressly state that the Federal question was actually decided, the clear inference is that it was in view of the reasons already referred to and the fact that the Federal question was argued; but even without such clear inference, the judgment as rendered could not have been rendered without deciding the Federal question presented. *Adams* v. *Russell*, 229 U. S. 353, 360. In further support of the contention that this case is within the appellate jurisdiction defined by Section 237(a) of the Judicial Code, 28 U. S. C. A. 344(a),

reference is made to *Gulf & S. I. R. Co.* v. *Hewes,* 183 U. S. 66, and *Griffith* v. *Connecticut,* 218 U. S. 563.

It is further submitted that the questions involved are substantial. When the United States Supreme Court is called upon to decide whether State legislation impairs the obligation of a contract, the questions are:

1. Was there a contract?

2. If so, what obligation arose from it?

3. Has that obligation been impaired by subsequent legislation?

Detroit United Railway v. *Michigan,* 242 U. S. 238, 249. The principal question here presented is: Did Chapter 243 of the New Jersey Laws of 1909 (*supra*) enter into and become a part of the contract of the appellant? If so, it seems to follow that there has been an impairment of the obligation by Chapter 12 of the New Jersey Laws of 1933.

The New Jersey Courts have recognized that the employment of school teachers is contractual, thus distinguishing such employment from the tenure of a public officer. *Gowdy* v. *State Board of Education,* 84 N. J. L. 231, affd. 85 N. J. L. 726, 86 Atl. 948, affd. 89 Atl. 1135. It has been held in other jurisdictions that such employment is contractual even though the teacher has become subject to a statute providing for permanent employment.

Martin v. *Fisher,* 108 Cal. App. 34; 291 Pac. 276;
School City of Elwood v. *State,* 203 Ind. 626, 180 N. E. 471;
Kostanzer v. *State,* 205 Ind. 536, 187 N. E. 337;
State v. *Blied,* 188 Wis. 442, 206 N. W. 213;
Steinson v. *Board of Education,* 165 N. Y. 431, 59 N. E. 300.

That a pension fund statute may become part of the contract of a teacher, thus placing modification beyond the power of the Legislature was held in *Ball* v. *Trustees,* 71

N. J. L. 64, 58 Atl. 111; followed in *Allen* v. *Board of Education,* 81 N. J. L. 135, 79 Atl. 101. In *State* v. *Board of School Directors,* 190 Wis. 445, 209 N. W. 683, the Supreme Court of Wisconsin stated, at p. 685, that the rights of a teacher who had become permanently employed under a statute generally similar to Chapter 243 of the New Jersey Laws of 1909 were contractual and could not be impaired by subsequent legislation or by action of the Board of Education.

As to the protection given contract rights by the Fourteenth Amendment, a contract was held to be property in *Long Island Water Supply Co.* v. *Brooklyn,* 116 U. S. 685.

Diligent search of the authorities during the course of this case has failed to disclose any decision of the United States Supreme Court deciding that a statute providing permanent employment for teachers after a certain period of probationary service does or does not create contractual rights which cannot be impaired by subsequent legislation. Nor has able counsel opposed to the appellant cited such decision. The questions here involved do not lack substance because they are already well settled, as in *Zucht* v. *King,* 260 U. S. 174 (cited in Rule 12, as amended March 2, 1936). It has been held that laws in force at the making of a contract enter into and become a part of it. *Northern Pacific* v. *Wall,* 214 U. S. 87. Whether the statute in question (Chapter 243, Laws of 1909) became a part of the contract is a substantial question. *Gulf & S. I. R. Co.* v. *Hewes,* 183 U. S. 66 (*supra*).

The recital of an emergency in the preamble to Chapter 12 of the New Jersey Laws of 1933 does not alter the situation, because the statute cannot be justified as emergency legislation by the rules laid down in *Home B. & L. Assn.* v. *Blaisdell,* 290 U. S. 398.

McCarter & English,
Attorneys for Appellant.
By Robert H. McCarter.

EXHIBIT "A".

Opinion of New Jersey Supreme Court—Reported in 115 N. J. L. 310, 180 Atl. 220.

JAY B. PHELPS, *Prosecutor,*

v.

STATE BOARD OF EDUCATION *et al., Defendants.*

LUCY ASKAM *et al., Prosecutor,*

v.

STATE BOARD OF EDUCATION *et al., Defendants.*

Argued May 10, 1935. Decided July 26, 1935.

1. Chapter 12 of the laws of 1933 (Pamph. L., p. 24) is not unconstitutional as impairing the obligation of contracts, or as depriving a citizen of the equal protection of the laws, as applied to the prosecutors in this case.

2. The proviso in chapter 12 of the laws of 1933 (Pamph. L., p. 24) forbidding discrimination among or between individuals in the same class of service is not violated by classifying teachers for purposes of salary reduction according to their former salaries.

3. The legislature by said act having declared the existence of an economic emergency requiring that certain powers be given to every board of education, it was not necessary for an individual board so to adjudge before exercising the powers.

On Certiorari.

Before Justices Parker, Case and Bodine.

For the prosecutors, Robert H. McCarter (Ward J. Herbert, on the brief).

For the defendants, Raymond J. Otis.

The opinion of the court was delivered by

PARKER, *J.*:

These two writs of certiorari bring up decisions of the state board of education, affirming on appeal decisions of the state commissioner of education which dismissed appeals of the several prosecutors challenging a resolution of the board of education of West New York in Hudson County, dated June 23d, 1933, which provided for certain reductions beginning July 1st, 1933, in salaries of the superintendent of schools, principals, supervisors and teachers, by percentages varying according to amount of salary; also a resolution readjusting the salaries of certain named clerks at certain stated figures. The commissioner of education dismissed the appeals before him on July 18th, 1934: the state board affirmed on February 9th, 1935.

The resolution first mentioned, relating to those having the status of teachers, is founded on chapter 12 of the laws of 1933 (Pamph. L., p. 24; N. J. Stat. Annual 1933, p. 410, sec. 185-225b), entitled "An act respecting the salaries or compensation of officers and employes, and persons holding positions in the several school districts of this state." This act contains the following preamble:

"Whereas, due to present economic conditions, an emergency exists which requires that the board of education of every school district in this state be enabled to fix and determine, by resolution, the amount of salary or compensation to be paid to officers and employes of and persons holding positions in any such school district," and proceeds to enact that

"The board of education of every school district in this state shall have full authority, by resolution, to fix and determine the salaries and compensation to be paid to officers and employes of and persons holding positions in any such school district, between the first day of July, 1933, and the first day of July, 1934, notwithstanding any such person be under tenure or not." There are certain provisos not here material, viz., that there shall be no increase of pay during the year; that rights in the pension fund remain unaffected; that the existing minimum salary of teach-

ers of $70 per month remain unchanged; and a further proviso, relied on by prosecutors as part of their case, "that in fixing salaries or compensation there shall be no discrimination among or between individuals in the same class of service." Section 2 provides that nothing in the act "shall be construed to affect or impair the continuity of position or employment under any tenure of office statute."

The resolution of June 23d, 1933, relating to teachers reads as follows:

"Resolved, that between July 1st, 1933, and July 1st, 1934, the salaries of the superintendent of schools and of all principals, supervisors and teachers in the West New York school system be and they are hereby reduced as follows:

"All salaries from $1,200 to $1,999 per annum reduced ten per cent.;

"All salaries from $2,000 to $2,499 per annum reduced eleven per cent.;

"All salaries from $2,500 to $2,999 per annum reduced twelve per cent.;

"All salaries from $3,000 to $3,499 per annum reduced thirteen per cent.;

"All salaries from $3,500 to $3,999 per annum reduced fourteen per cent.;

"All salaries from $4,000 to $5,600 per annum reduced fifteen per cent.;

All figures being inclusive; provided, however, that the salary of any elementary school teacher shall not be reduced below the minimum of $1,200 per annum, and the salary of any high school teacher shall not be reduced below the minimum of $1,600 per annum."

The other resolution of like date relates to "clerks" and is as follows:

"Resolved, that between July 1st, 1933, and July 1st, 1934, the salaries of clerks in the West New York school system be and they are hereby reduced to the amounts set opposite their respective names below:

"Pearl Rutan	$2,200	per annum.
Rose Millimet	1,600	" "
Caroline Johansen	1,600	" "
Madelyn Offerman	1,200	" "
Angela Wintrich	1,200	" "
Marie Martin	1,200	" "
Sylvia Wilson	1,200	" "
Cathleen Bach	1,200	" "
Virginia Otis	1,000	" "
Helen Roth	900	" "
Marion Holm	900	" "

We take up first the resolution affecting the teacher group. As to this, the two main propositions are that the act of 1933 is unconstitutional as impairing the obligation of contracts; and secondly, that the scheme of salary reductions violates the proviso in that act forbidding "discrimination among or between individuals in the same class of service."

The argument for unconstitutionality proceeds on these lines: after three years of contract service the teachers are entitled generally to indefinite tenure under the act of 1909, chapter 243 (Pamph. L., p. 398; 4 Cum. Supp. Comp. Stat., p. 4763, Sec. 106a); that tenure is contractual; and the legislature is powerless to interfere with it, or to authorize a board of education to interfere. All the prosecutors in the teacher group are in the indefinite tenure class.

The act of 1909, relating to tenure, provides, among other things, that no teacher shall be dismissed or subjected to reduction of salary except for certain causes after charges and a trial. That established a legislative status for teachers, but we fail to see that it established a contractual one that the legislature may not modify. If the argument now made is sound, the act of 1909 is irrepealable as to any teacher holding his position by tenure at any time thereafter. A board of education is a public body, created by the legislature, with certain powers conferred by statute. It is a municipal corporation, or at least a quasi-municipal corporation, and, as such, subject to supervision and control by the legislature. The act of 1933 is in

purport and effect, though not so entitled, an implied partial repealer or amendment of the Tenure act of 1909, and we are clear that it was well within the power of the legislature. The status of tenure teachers, while in one sense perhaps contractual, is in essence dependent on a status, like that of the incumbent of a statutory office, which the legislature at will may abolish, or whose emoluments it may change. See *Vroom* v. *Board of Education*, 79 N. J. L. 46. We are clear that the legislature could repeal the act of 1909. If it could repeal it, it can modify it as thought best, and that it did by the act of 1933. It is suggested in the brief that the teachers have rights of the same standing as those of bondholders but we see no merit in this suggestion and hardly think it is made seriously.

Secondly, with regard to the claim that there is in the resolution discrimination between individuals in the same class of service because of the varying percentages of reduction based on salary limits. We are unable to perceive any such discrimination. The resolution relating to teachers divides them into six classes according to salary, the first class including those drawing salaries from $1,200 to $1,999 per annum, and so upward by steps of $500 each except the last, where the limits are from $4,000 to $5,600. The higher the salary, the greater the percentage of reduction. But every one in the same class suffers the same per cent. reduction. It is true that in some cases where one salary is just over the minimum of the class, and another just under the maximum of the next class below, the first is cut to below the second; but that does not create a discrimination between individuals in the same class of service; it is simply an arithmetical result of applying a general formula. Counsel point out what is probably a clerical error touching two individuals who are apparently not parties to this proceeding. The complaint here is that the board did not follow its own resolution; but that vagary is not the object of attack by these writs. Again, it is said that the board paid no attention to individual merit or demerit. Naturally, it did not, as that is expressly forbidden by the statute of 1933.

As to the resolution bearing on the clerks, counsel for respondent argues that they are not entitled to protection under the Tenure act, and claims they are not protected by the proviso in the act of 1933. But be this as it may, we concur in the view of the commissioner of education that the reductions are likewise by classes according to salary, the two $1,600 clerks being reduced from $2,300; the four $1,200 clerks from $1,500; the one $1,000 clerk from $1,100; the two $900 clerks being new employes. As to the two so-called teacher-clerks, we think that one holding a teacher's certificate but doing only clerical work is properly classified as a clerk. The question is what such a person is doing, not what he or she is certified as qualified to do.

Much of the voluminous brief for the prosecutors is devoted to the proposition that "there is not justification for the assumption that there was in West New York at the time of the adoption of the salary resolutions, such a financial debacle as justified the passage of the resolutions." The brief treats this matter as though the board, without so alleging in its resolutions, assumed the existence of an emergency in West New York, and as though this court must, if it can, assume such existence in order to support the resolutions. But the preamble of the statute, fully quoted above, expressly recites that "due to present economic conditions an emergency exists which requires that boards of education be enabled to fix and determine," etc. The argument apparently ignores this fact, viz., that the legislature itself in its preamble not only assumed, but declared, the existence of an emergency "which requires that the board of education of *every* school district in this state be enabled," etc. Language could not be broader or more definite, as a preface to the enacting clause.

The judgments and decisions of the state board under review will be affirmed, with costs.

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Rules of the Supreme Court of the United States, Rule 46, par. 2	1, 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 455

LUCY ASKAM ET AL.,

Appellants,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK AND STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY.

Appellees.

STATEMENT PURSUANT TO RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

This case is one in which the validity of a statute of the State of New Jersey, to wit, Chapter 12 of the New Jersey Laws of 1933, approved February 4, 1933, is drawn in question upon the ground that the said statute is repugnant to Article 1, Section 10 of the Constitution of the United States, and also repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States. The final decision of the Court of Errors and Appeals in the last resort in all causes in the State of New Jersey, the highest court of said State in which a decision in the above entitled cause could be had, is in favor of the validity of said statute. Therefore, in accordance with Rule 46, Para-

graph 2, of the Rules of the Supreme Court of the United States (28 U. S. C. A.), the petitioners respectfully show that this case is one in which under the legislation in force when the act of January 31, 1928 (45 Stat. 54), as amended by the act of April 26, 1928 (45 Stat. 466), was passed, to wit, under Section 237(a) of the Judicial Code (28 U. S. C. A., Section 344), a review could be had in the Supreme Court of the United States on writ of error.

As stated above, the Statute of New Jersey, the validity of which is involved in this case, is Chapter 12 of the New Jersey Laws of 1933 (P. L. 1933, page 24), which statute reads as follows:

> "An Act respecting the salaries or compensation of officers and employees of and persons holding positions in the several school districts of this State.
>
> Whereas, due to present economic conditions, an emergency exists which requires that the board of education of every school district in this State be enabled to fix and determine, by resolution, the amount of salary or compensation to be paid to officers and employees of and persons holding positions in any such school district; therefore,
>
> Be it Enacted by the Senate and General Assembly of the State of New Jersey:
>
> 1. The board of education of every school district in this State shall have full authority, by resolution, to fix and determine the salaries and compensation to be paid to officers and employees of and persons holding positions in any such school district, between the first day of July, one thousand nine hundred and thirty-three, and the first day of July, one thousand nine hundred and thirty-four, notwithstanding any such person be under tenure or not; *Provided, However,* that no salary or compensation of any officer or employee of or person holding a position in any school district shall be increased between the first day of July, one thousand nine hundred and thirty-three, and the first day

of July, one thousand nine hundred and thirty-four; *And Provided, Further*, that if any such person be a member of the Teachers' Pension and Annuity Fund of the State of New Jersey, or any employees' pension fund, such person may continue to pay, or cause to be paid, into such pension fund the same amount as if such salary or compensation had not been changed, and upon the death or retirement of such member, he or his beneficiary shall be entitled to the same benefits as if his salary or compensation had not been changed; *And Provided, Further*, that in fixing salaries or compensation there shall be no discrimination among or between individuals in the same class of service; provided, however, that the existing minimum salary of teachers of seventy dollars per month shall not be changed.

2. Nothing in this act contained shall be construed to affect or impair the continuity of position or employment under any tenure of office statute.

3. This act shall take effect immediately.

Approved February 4, 1933."

Judgment in this case was entered by the New Jersey Court of Errors and Appeals on May 21, 1936 and the petition for appeal, which this statement accompanies, is being presented on August 20th, 1936.

The foregoing statute has by its terms the effect of modifying Chapter 243 of the New Jersey Laws of 1909 (P. L. 1909, p. 398). That Chapter provides in part:

"No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons making the same, and filed with the secretary or clerk of the board of education having charge of the school

in which the service is being rendered, and after the charge shall have been examined into and found true in fact by said board of education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing."

* * * * * * * *

"Nothing herein contained shall be held to limit the right of any school board to reduce the number of principals or teachers employed in any school district when such reduction shall be due to a natural diminution of the number of pupils in said school district; and provided further, that the service of any principal or teacher may be terminated without charge or trial who is not the holder of a proper teacher's certificate in full force and effect."

Appellants in the present case are all teachers or principals who have been employed for more than three consecutive years in the school district of the Town of West New York prior to the passage of Chapter 12 of the Laws of 1933 (*supra*). In reliance upon Chapter 12 of the Laws of 1933 the Board of Education of the Town of West New York undertook, by resolution, to reduce the salaries of its employes, including the salaries of the appellants. The appellants thereupon instituted proceedings to test the legality of such action, contending before all of the tribunals below, and contending here, that when each of them began his fourth year of teaching, Chapter 243 of the New Jersey Laws of 1909 (*supra*) entered into and became a part of their contract of employment and that the attempt of the New Jersey Legislature to modify that contract by Chapter 12 of the Laws of 1933 (*supra*) is unconstitutional.

The Federal questions here sought to be reviewed were raised and argued in all of the tribunals of the State of New Jersey passing upon this case. The case was presented in

the first instance to the Commissioner of Education of the State of New Jersey pursuant to the New Jersey School Law (4 Comp. Stat. p. 4727, Sec. 10). This was done by petition of appeal alleging, among other things, that Chapter 12 of the New Jersey Laws of 1933, *supra*, was unconstitutional. In the brief submitted to the Commissioner, specific reference was made to and argument based on the contract clause of the United States Constitution (Article 1, Section 10) and Section 1 of the Fourteenth Amendment as well as the New Jersey Constitution. The Commissioner refused to pass upon the constitutional questions raised upon the ground that he had no jurisdiction to do so, saying in his decision,

> "The State Board of Education in the case of *Albertson* v. *Glassboro*, decided December 1, 1924, held:
> "Neither * * * the Commissioner nor this Board is empowered to declare any act passed by the Legislature to be contrary to the Constitution * * *."

An appeal was then taken to the New Jersey State Board of Education pursuant to the School Law (4 Comp. Stat. p. 4727, Sec. 10). This was done merely by notice of appeal, no grounds of appeal or assignment of errors being necessary. Before the State Board the same provisions of the United States Constitution were referred to and used as a basis of argument against the constitutionality of the statute in question, but the State Board in its decision adopted the same course followed by the Commissioner and refused to pass upon the question of constitutionality. The next step was the allowance of a writ of certiorari by the New Jersey Supreme Court.

The questions presented to that Court were defined by the reasons filed in support of the writ. These reasons are set forth at page 83 of the State Of Case presented to the

New Jersey Court of Errors and Appeals. Reason #3 reads as follows:

> "3. The action of the Board of Education of the Town of West New York in reducing prosecutors' salaries for the period between July 1, 1933, and July 1, 1934, is illegal, in that Chapter 12 of the Laws of 1933 authorizing Boards of Education to reduce salaries of employees, whether under tenure or not, is unconstitutional in the following respects:
>
> (a) It violates Article IV, sec. 7, par. 3 of the Constitution of New Jersey.
>
> (b) It violates Article I, sec. 10 of the Constitution of the United States by impairing the Obligation of Contracts.
>
> (c) It violates Amendment XIV, sec. 1 of the Constitution of the United States by depriving persons of property without due process of law and by denying to them the equal protection of the laws."

The constitutional questions thus defined by reason #3 were actually argued before the New Jersey Supreme Court. That Court held the statute constitutional. A copy of the opinion is hereto appended. On appeal to the New Jersey Court of Errors and Appeals it was also argued that the statute was unconstitutional under the contract clause of the United States Constitution and under Section 1 of the Fourteenth Amendment. After considering this argument the Court of Errors and Appeals affirmed the Supreme Court and adopted its opinion. The grounds of appeal before the Court of Errors and Appeals made no mention of the constitutional question because of the well settled rule of New Jersey practice that on appeal from a judgment entered in the Supreme Court, where that court sat as a reviewing court, the only correct assignment of error is that the Supreme Court erred in reversing or af-

firming. On such an assignment, reliance may be had upon the errors assigned in the Supreme Court. *Kleinert* v. *Hutchinson*, 98 N. J. L. 831; 121 Atl. 742. That practice was followed in the present case and, as stated, the constitutional questions were argued fully before the Court of Errors and Appeals as well as before the Supreme Court and the other tribunals.

The opinion of the New Jersey Supreme Court which is appended hereto, as stated above, applies not only to the present case but also to the companion case of *Phelps* v. *Board of Education of the Town of West New York, et al.*, the two cases having been argued together. The only opinion filed by the Court of Errors and Appeals was reported in 116 N. J. L. 416, and reads as follows:

> "The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Parker in the Supreme Court."

On the basis of the foregoing brief history of the case, it is submitted that at every step the validity of the New Jersey Statute (Chapter 12, Laws of 1933) was called in question on the ground of its being repugnant to the Constitution of the United States and, the decision being in favor of the statute's validity, an appeal should be allowed under Section 237(a) of the Judicial Code (28 U. S. C. A. 344(a)) as modified by the act of January 31, 1928 (28 U. S. C. A., Sec. 861a). The Federal question was presented for decision and its decision was necessary to the determination of the cause. Although the opinion of the New Jersey Supreme Court (which was adopted by the Court of Errors and Appeals) does not expressly state that the Federal question was actually decided, the clear inference is that it was in view of the Reasons already referred to and the fact that the Federal question was argued; but

even without such clear inference, the judgment as rendered could not have been rendered without deciding the Federal question presented. *Adams* v. *Russell,* 229 U. S. 353, 360. In further support of the contention that this case is within the appellate jurisdiction defined by Section 237(a) of the Judicial Code, 28 U. S. C. A. 344(a), reference is made to *Gulf & S. I. R. Co.* v. *Hewes,* 183 U. S. 66, and *Griffith* v. *Connecticut,* 218 U. S. 563.

It is further submitted that the questions involved are substantial. When the United States Supreme Court is called upon to decide whether State legislation impairs the obligation of a contract, the questions are:

1. Was there a contract?

2. If so, what obligation arose from it?

3. Has that obligation been impaired by subsequent legislation?

Detroit United Railway v. *Michigan,* 242 U. S. 238, 249. The principal question here presented is: Did Chapter 243 of the New Jersey Laws of 1909 (*supra*) enter into and become a part of the contracts of the appellants? If so, it seems to follow that there has been an impairment of the obligation by Chapter 12 of the New Jersey Laws of 1933.

The New Jersey Courts have recognized that the employment of school teachers is contractual, thus distinguishing such employment from the tenure of a public officer. *Gowdy* v. *State Board of Education,* 84 N. J. L. 231, affd. 85 N. J. L. 726; 86 Atl. 948, affd. 89 Atl. 1135. It has been held in other jurisdictions that such employment is contractual even though the teacher has become subject to a statute providing for permanent employment.

Martin v. *Fisher,* 108 Cal. App. 34, 291 Pac. 276;
School City of Elwood v. *State,* 203 Ind. 626, 180 N. E. 471;

Kostanzer v. *State,* 205 Ind. 536, 187 N. E. 337;
State v. *Blied,* 188 Wis. 442, 206 N. W. 213;
Steinson v. *Board of Education,* 165 N. Y. 431, 59 N. E. 300.

That a pension fund statute may become part of the contract of a teacher, thus placing modification beyond the power of the Legislature, was held in *Ball* v. *Trustees,* 71 N. J. L. 64, 58 Atl. 111; followed in *Allen* v. *Board of Education,* 81 N. J. L. 135, 79 Atl. 101. In *State* v. *Board of School Directors,* 190 Wis. 445, 209 N. W. 683, the Supreme Court of Wisconsin stated, at p. 685, that the rights of a teacher who had become permanently employed under a statute generally similar to Chapter 243 of the New Jersey Laws of 1909 were contractual and could not be impaired by subsequent legislation or by action of the Board of Education.

As to the protection given contract rights by the Fourteenth Amendment, a contract was held to be property in *Long Island Water Supply Co.* v. *Brooklyn,* 116 U. S. 685.

Diligent search of the authorities during the course of this case has failed to disclose any decision of the United States Supreme Court deciding that a statute providing permanent employment for teachers after a certain period of probationary service does or does not create contractual rights which cannot be impaired by subsequent legislation. Nor has able counsel opposed to the appellants cited such decision. The questions here involved do not lack substance because they are already well settled, as in *Zucht* v. *King,* 260 U. S. 174 (cited in Rule 12 as amended March 2, 1936). It has been held that laws in force at the making of a contract enter into and become a part of it. *Northern Pacific* v. *Wall,* 214 U. S. 87. Whether the statute in question (Chapter 243, Laws of 1909) became a part of the con-

tract is a substantial question. *Gulf & S. I. R. Co.* v. *Hewes*, 183 U. S. 66 (*supra*).

The recital of an emergency in the preamble to Chapter 12 of the New Jersey Laws of 1933 does not alter the situation, because the statute cannot be justified as emergency legislation by the rules laid down in *Home B. & L. Assn.* v. *Blaisdell*, 290 U. S. 398.

McCarter & English,
Attorneys for Appellants.
By Robert H. McCarter.

EXHIBIT "A".

Opinion of New Jersey Supreme Court—Reported in 115 N. J. L. 310, 180 Atl. 220.

JAY B. PHELPS, *Prosecutor,*

v.

STATE BOARD OF EDUCATION *et al., Defendants.*

LUCY ASKAM *et al., Prosecutor,*

v.

STATE BOARD OF EDUCATION *et al., Defendants.*

Argued May 10, 1935. Decided July 26, 1935.

1. Chapter 12 of the laws of 1933 (Pamph. L., p. 24) is not unconstitutional as impairing the obligation of contracts, or as depriving a citizen of the equal protection of the laws, as applied to the prosecutors in this case.

2. The proviso in chapter 12 of the laws of 1933 (Pamph. L., p. 24) forbidding discrimination among or between individuals in the same class of service is not violated by classifying teachers for purposes of salary reduction according to their former salaries.

3. The legislature by said act having declared the existence of an economic emergency requiring that certain powers be given to every board of education, it was not necessary for an individual board so to adjudge before exercising the powers.

On Certiorari.

Before Justices Parker, Case and Bodine.

For the prosecutors, Robert H. McCarter (Ward J. Herbert, on the brief).

For the defendants, Raymond J. Otis.

The opinion of the court was delivered by

PARKER, *J.*:

These two writs of certiorari bring up decisions of the state board of education, affirming on appeal decisions of the state commissioner of education which dismissed appeals of the several prosecutors challenging a resolution of the board of education of West New York in Hudson County, dated June 23d, 1933, which provided for certain reductions beginning July 1st, 1933, in salaries of the superintendent of schools, principals, supervisors and teachers, by percentages varying according to amount of salary; also a resolution readjusting the salaries of certain named clerks at certain stated figures. The commissioner of education dismissed the appeals before him on July 18th, 1934: the state board affirmed on February 9th, 1935.

The resolution first mentioned, relating to those having the status of teachers, is founded on chapter 12 of the laws of 1933 (Pamph. L., p. 24; N. J. Stat. Annual 1933, p. 410, Sec. 185-225b), entitled "An act respecting the salaries or compensation of officers and employes, and persons holding positions in the several school districts of this state." This act contains the following preamble:

"Whereas, due to present economic conditions, an emergency exists which requires that the board of education of every school district in this state be enabled to fix and determine, by resolution, the amount of salary or compensation to be paid to officers and employes of and persons holding positions in any such school district," and proceeds to enact that

"The board of education of every school district in this state shall have full authority, by resolution, to fix and determine the salaries and compensation to be paid to officers and employes of and persons holding positions in any such school district, between the first day of July, 1933, and the first day of July, 1934, notwithstanding any such person be under tenure or not." There are certain provisos not here material, viz., that there shall be no increase of pay during the year; that rights in the pension fund remain unaffected; that the existing minimum salary of teachers

of $70 per month remain unchanged; and a further proviso, relied on by prosecutors as part of their case, "that in fixing salaries or compensation there shall be no discrimination among or between individuals in the same class of service." Section 2 provides that nothing in the act "shall be construed to affect or impair the continuity of position or employment under any tenure of office statute."

The resolution of June 23d, 1933, relating to teachers reads as follows:

"Resolved, that between July 1st, 1933, and July 1st, 1934, the salaries of the superintendent of schools and of all principals, supervisors and teachers in the West New York school system be and they are hereby reduced as follows:

"All salaries from $1,200 to $1,999 per annum reduced ten per cent.;

"All salaries from $2,000 to $2,499 per annum reduced eleven per cent.;

"All salaries from $2,500 to $2,999 per annum reduced twelve per cent.;

"All salaries from $3,000 to $3,499 per annum reduced thirteen per cent.;

"All salaries from $3,500 to $3,999 per annum reduced fourteen per cent.;

"All salaries from $4,000 to $5,600 per annum reduced fifteen per cent.;

All figures being inclusive; provided, however, that the salary of any elementary school teacher shall not be reduced below the minimum of $1,200 per annum, and the salary of any high school teacher shall not be reduced below the minimum of $1,600 per annum."

The other resolution of like date relates to "clerks" and is as follows:

"Resolved, that between July 1st, 1933, and July 1st, 1934, the salaries of clerks in the West New York school

system be and they are hereby reduced to the amounts set opposite their respective names below:

"Pearl Rutan	$2,200	per annum.
Rose Millimet	1,600	" "
Caroline Johansen	1,600	" "
Madelyn Offerman	1,200	" "
Angela Wintrich	1,200	" "
Marie Martin	1,200	" "
Sylvia Wilson	1,200	" "
Cathleen Bach	1,200	" "
Virginia Otis	1,000	" "
Helen Roth	900	" "
Marion Holm	900	" "

We take up first the resolution affecting the teacher group. As to this, the two main propositions are that the act of 1933 is unconstitutional as impairing the obligation of contracts; and secondly, that the scheme of salary reductions violates the proviso in that act forbidding "discrimination among or between individuals in the same class of service."

The argument for unconstitutionality proceeds on these lines: after three years of contract service the teachers are entitled generally to indefinite tenure under the act of 1909, chapter 243 (Pamph. L., p. 398; 4 Cum. Supp. Comp. Stat., p. 4763, Sec. 106a); that tenure is contractual; and the legislature is powerless to interfere with it, or to authorize a board of education to interfere. All the prosecutors in the teacher group are in the indefinite tenure class.

The act of 1909, relating to tenure, provides, among other things, that no teacher shall be dismissed or subjected to reduction of salary except for certain causes after charges and a trial. That established a legislative status for teachers, but we fail to see that it established a contractual one that the legislature may not modify. If the argument now made is unsound, the act of 1909 is irrepealable as to any teacher holding his position by tenure at any time thereafter. A board of education is a public body, created by the legislature, with certain powers conferred by statute. It is a municipal corporation, or at least a quasi-municipal corporation, and, as such, subject to supervision

and control by the legislature. The act of 1933 is in purport and effect, though not so entitled, an implied partial repealer or amendment of the Tenure act of 1909, and we are clear that it was well within the power of the legislature. The status of tenure teachers, while in one sense perhaps contractual, is in essence dependent on a status, like that of the incumbent of a statutory office, which the legislature at will may abolish, or whose emoluments it may change. See *Vroom* v. *Board of Education,* 79 N. J. L. 46. We are clear that the legislature could repeal the act of 1909. If it could repeal it, it can modify it as thought best, and that it did by the act of 1933. It is suggested in the brief that the teachers have right of the same standing as those of bondholders but we see no merit in this suggestion and hardly think it is made seriously.

Secondly, with regard to the claim that there is in the resolution discrimination between individuals in the same class of service because of the varying percentages of reduction based on salary limits. We are unable to perceive any such discrimination. The resolution relating to teachers divides them into six classes according to salary, the first class including those drawing salaries from $1,200 to $1,999 per annum, and so upward by steps of $500 each except the last, where the limits are from $4,000 to $5,600. The higher the salary, the greater the percentage of reduction. But every one in the same class suffers the same per cent. reduction. It is true that in some cases where one salary is just over the minimum of the class, and another just under the maximum of the next class below, the first is cut to below the second; but that does not create a discrimination between individuals in the same class of service; it is simply an arithmetical result of applying a general formula. Counsel point out what is probably a clerical error touching two individuals who are apparently not parties to this proceeding. The complaint here is that the board did not follow its own resolution; but that vagary is not the object of attack by these writs. Again, it is said that the board paid no attention to individual merit or demerit. Naturally, it did not, as that is expressly forbidden by the statute of 1933.

As to the resolution bearing on the clerks, counsel for respondent argues that they are not entitled to protection under the Tenure act, and claims they are not protected by the proviso in the act of 1933. But be this as it may, we concur in the view of the commissioner of education that the reductions are likewise by classes according to salary, the two $1,600 clerks being reduced from $2,300; the four $1,200 clerks from $1,500; the one $1,000 clerk from $1,100; the two $900 clerks being new employes. As to the two so-called teacher-clerks, we think that one holding a teacher's certificate but doing only clerical work is properly classified as a clerk. The question is what such a person is doing, not what he or she is certified as qualified to do.

Much of the voluminous brief for the prosecutors is devoted to the proposition that "there is no justification for the assumption that there was in West New York at the time of the adoption of the salary resolutions, such a financial debacle as justified the passage of the resolutions." The brief treats this matter as though the board, without so alleging in its resolutions, assumed the existence of an emergency in West New York, and as though this court must, if it can, assume such existence in order to support the resolutions. But the preamble of the statute, fully quoted above, expressly recites that "due to present economic conditions an emergency exists which requires that boards of education be enabled to fix and determine," etc. The argument apparently ignores this fact, viz., that the legislature itself in its preamble not only assumed, but declared, the existence of an emergency "which requires that the board of education of *every* school district in this state be enabled," etc. Language could not be broader or more definite, as a preface to the enacting clause.

The judgments and decisions of the state board under review will be affirmed, with costs.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 454

JAY B. PHELPS,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK AND STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

REINHOLD HEKELER,
SAUL NEMSER,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 454

JAY B. PHELPS,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK AND STATE BOARD OF EDUCATION,

Appellees.

APPELLEE'S STATEMENT PURSUANT TO RULE 12, PARAGRAPH "3", OPPOSING JURISDICTION, WITH MOTION TO DISMISS AND, IN THE ALTERNATIVE, MOTION TO AFFIRM.

The appellee, Board of Education of The Town of West New York, pursuant to the provisions of Rule 12, Paragraph 3 of this Court, writes down the following matters and grounds making against the jurisdiction of this Court asserted by appellant.

I.

The appeal in the instant case presents for review, the decision of a State court, construing a State statute and determining that it is not violative of the State Constitution. The gist of the State court's opinion involves purely

a matter of local law. A Federal question was not decided by the State Court, nor was its decision necessary to a determination of the cause.

The opinion of the New Jersey Supreme Court is officially reported in 115 N. J. L. 310, and was affirmed by the New Jersey Court of Errors and Appeals in 116 N. J. L. 412.

The Statutes involved are P. L. 1909, p. 398, being Chapter 243 of the New Jersey Public Laws of 1909 (the so-called Teacher's Tenure Act) and P. L. 1933, p. 24, being Chapter 12 of the New Jersey Public Laws of 1933, which latter Act the New Jersey Court held in its opinion, to have modified and repealed part of the 1909 Tenure Act.

The 1909 Statute reads as follows:

> "A Supplement to an act entitled "An act to establish a thorough and efficient system of free public schools and to provide for the maintenance, management and support thereof," approved October nineteenth, one thousand nine hundred and three.
>
> BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:
>
> 1. The service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board; provided, that the time any teacher, principal, supervising principal has taught in the district in which he or she is employed at the time this act shall go into effect, shall be counted in determining such period of employment. No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons

making the same, and filed with the secretary or clerk of the Board of Education having charge of the school in which the service is being rendered, and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing. Charges may be filed by any person, whether a member of said school board or not.

2. Said Board of Education shall have power to issue writs af subpœna on behalf of either party to compel attendance of witnesses to testify before said board in the matter under investigation, which subpœna shall be issued under the seal of said board and be signed by the secretary or clerk thereof, and shall be served in the same manner as subpœnas issued out of the Courts of Common Pleas of this State, and every person who refuses or neglects to obey the command of such a writ, or, who, after appearing, refuses to be sworn and testify, shall in either event be liable to a penalty of fifty dollars, to be sued for in the name of said board in any court of competent jurisdiction, which penalty when collected shall be paid to the treasurer or custodian of moneys of said board. Any member of said board is hereby authorized to administer oaths to such witnesses as may appear or be brought before it, and any person who shall have been so sworn and who shall testify falsely, shall be guilty of perjury.

3. Nothing herein contained shall be held to limit the right of any school board to reduce the number of principals or teachers employed in any school district when such reduction shall be due to a natural diminution of the number of pupils in said school district; and, provided further, that the service of any principal or teacher may be terminated without charge or trial who is not the holder of a proper teacher's certificate in full force and effect.

4. This act shall take effect September first, one thousand nine hundred and nine.

Approved April 21, 1909."

The 1933 Statute reads as follows:

"AN ACT respecting the salaries or compensation of officers and employees of and persons holding positions in the several school districts of this State.

WHEREAS, due to present economic conditions, an emergency exists which requires that the board of education of every school district in this State be enabled to fix and determine, by resolution, the amount of salary or compenastion to be paid to officers and employees of and persons holding positions in any such school district; therefore,

BE IT ENACTED BY THE SENATE AND GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY:

1. The board of education of every school district in this State shall have full authority, by resolution, to fix and determine the salaries and compensation to be paid to officers and employees of and persons holding positions in any such school district, between the first day of July, one thousand nine hundred and thirty-three, and the first day of July, one thousand nine hundred and thirty-four, notwithstanding any such person be under tenure or not; *Provided, However,* that no salary or compensation of any officer or employee of or person holding a position in any school district shall be increased between the first day of July, one thousand nine hundred and thirty-three, and the first day of July, one thousand nine hundred and thirty-four; *And Provided, Further,* that if any such person be a member of the Teachers' Pension and Annuity Fund of the State of New Jersey, or any employees' pension fund, such person may continue to pay, or cause to be paid, into such pension fund the same amount as if such salary or compensation had not been changed, and upon the death or retirement of such member, he or his beneficiary shall be entitled to the same benefits as if his salary or compensation had not been changed; *And Provided, Further,* that in fixing salaries or compensation there shall be no discrimination among or

between individuals in the same class of service; provided, however, that the existing minimum salary of teachers of seventy dollars per month shall not be changed.

2. Nothing in this act contained shall be construed to effect or impair the continuity of position or employment under any tenure of office statute.

3. This act shall take effect immediately.

Approved February 4, 1933."

The resolution adopted by appellee, pursuant to the authority of the 1933 Act, reads as follows:

"RESOLVED, That between July 1, 1933, and July 1, 1934, the salaries of the Superintendent of Schools and of all principals, supervisors and teachers in the West New York School System be and they are hereby reduced as follows:

All salaries from $1200 to $1999 per annum reduced ten per cent;

All salaries from $2000 to $2499 per annum reduced eleven per cent;

All salaries from $2500 to $2999 per annum reduced twelve per cent;

All salaries from $3000 to $3499 per annum reduced thirteen per cent;

All salaries from $3500 to $3999 per annum reduced fourteen per cent;

All salaries from $4000 to $5600 per annum reduced fifteen per cent;

all figures being inclusive; provided, however, that the salary of any elementary school teacher shall not be reduced below the minimum of $1200 per annum, and the salary of any high school teacher shall not be reduced below the minimum of $1600 per annum.

(Sgd.) ARTHUR H. EINBECK.

Dated, June 23, 1933."

A perusal of the State Court's opinion indicates that it construed the 1909 Act, not as conferring irrevocably vested contractual obligations on the school teachers of New Jersey, but on the contrary, that the statute established "a legislative status for teachers" and that the status of tenure teachers is in "essence dependent on a statute * * * which the legislature at will may abolish, or whose emoluments it may change"; that the 1933 Act constitutes "an implied partial repealer or amendment to the tenure act of 1909" and is not repugnant to the provisions of the Constitution of the State of New Jersey inhibiting the impairment of obligations of contract.

This interpretation by the State Court, as to the meaning and effect to be attributed to the tenure act of 1909 and its elucidation of the status of teachers in New Jersey thereunder, makes manifest that the 1909 Act did not create a *contractual* obligation and hence there could be no constitutional impairment by the subsequent legislation of 1933; because no *contract* in law or fact, had ever existed.

This holding by the State Court made it entirely unnecessary to consider or determine the question whether the contract clause of the Federal Constitution had been violated by the 1933 statute.

Such interpretation by the New Jersey courts of a State Statute will be accepted by this Court and does not raise a Federal question properly reviewable by this Court.

First National Bank of Garnett v. *Ayers*, 160 U. S. 660;
Carstairs v. *Cochran*, 193 U. S., page 10;
Tampa Waterworks Company v. *City of Tampa*, 199 U. S. 241;
Quong Ham Wah Company v. *Industrial Accident Company*, 255 U. S. 445;
Terrace v. *Thompson*, 263 U. S. 197;
Supreme Lodge, etc. v. *Meyer*, 265 U. S. 30;
American Ry. Express Co. v. *Commonwealth of Kentucky*, 273 U. S. 269.

To give this Court jurisdiction it must appear affirmatively, not only that the Federal question was presented for decision, but that its decision was necessary to a determination of the cause, and that it was actually decided, or that the judgment could not have been given without deciding it.

Cleveland & P. R. Co. v. *Cleveland,* 235 U. S. 50;
Parker v. *McLain,* 237 U. S. 469.

In *Bachtel* v. *Wilson,* 204 U. S. 36, this Court held that before it can pronounce a judgment of a State Court to be "in conflict with the Federal Constitution, it must be made to appear that its decision was one necessarily in conflict therewith, and not that possibly, or even probably, it was."

It is respectfully submitted that jurisdiction should be declined because a Federal question of substance was neither presented to nor decided by the State Court, nor was a Federal question necessary to the determination of the cause.

II.

Motion to Dismiss and, in the Alternative, to Affirm.

Now comes the appellee, the Board of Education of the Town of West New York, by Saul Nemser, its counsel, and moves this Court to dismiss the appeal for want of jurisdiction; and in the alternative, said appellee moves to affirm the judgment of the New Jersey Court of Errors and Appeals as the Last Resort in all causes, upon the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The appellant cites cases bearing on the question of tenure rights which clearly involve unwarranted acts of school boards while a "Tenure Act" was in full force and effect; *without amendment or modification,* or which involve cases where teachers have made contributions to a

pension or retirement fund and, therefore, had acquired certain vested property rights in such fund, which, obviously, could not be diminished or disturbed to the prejudice of the contributors by subsequent legislation.

None of these cases are in point and fall far short of supporting appellant's position.

In none of these cases was the issue one which questions the right of the State to repeal, amend or modify its own laws. None of these cases have any relevancy to a situation where the State as the Sovereign power, modifies its own law—the Tenure Act—to affect salaries to accrue in the future—beginning with and during a new and subsequent school year.

The reduction in appellant's salary was 13% and became effective for the school year next following the date of the adoption of the resolution. The 1933 statute was enacted on February 4, 1933. The resolution reducing appellant's salary among others was adopted by the appellee on June 23, 1933, and became effective during the new fiscal year July 1, 1933-July 1, 1934. As a practical matter and due to the intervening summer vacation, appellant was not affected until school opened on September 1, 1933.

The action of the New Jersey Legislature in modifying the 1909 Tenure Act, for the limited period of one year, did not impinge upon any of the alleged rights of appellant.

"There can be no vested right in an existing law which precludes its change or repeal". 12 *C. J.* 958.

According to the New Jersey court's rational construction of the Tenure Act of 1909, it conferred upon the appellant and other school teachers of the State of New Jersey the right to be employed—after the expiration of a three year probationary period—during good behavior and efficiency without dismissal or reduction in salary, except for the causes enumerated in the statute. This conferred

upon appellant a *personal* right or privilege which he could neither assign nor transfer, and which the legislature could withdraw entirely or in part, as it pleased.

"The term 'vested rights' relates to property rights only and does not apply to personal rights". 12 *C. J.* 956.

Judge Cooley in his work on *Constitutional Limitations* (7th Ed.), page 402, states that citizens have no vested right in the existing general laws of the State which can preclude their amendment or repeal, and that there is no implied promise on the part of the State to protect its citizens against incidental injury occasioned by the changes in the law. See

People ex rel. Cunningham et al. v. *Roper et al*, 35 N. Y. 629;

People ex rel. Davies v. Commissioners of Taxes, 47 N. Y. 501;

Rector, etc., of Christ Church, Philadelphia, v. *County of Philadelphia*, 24 How. 300.

Appellant did nothing other than to accept another year's employment at the hands of the local Board of Education.

If the construction placed on the 1909 Act by the New Jersey court in the case at bar is to prevail, then clearly appellant has no contract and never had a contract in the full sense of the term. Thus a contractual *obligation* could not possibly be impaired and, therefore, a question could not possibly arise under the contract clause of the Federal Constitution.

At any rate, if appellant's contentions are tenable, and even if it be assumed that he acquired vested contractual rights under the Act of 1909 which the State was powerless to modify—still the 1933 statute constitutes proper emergency legislation.

The Preamble to the 1933 Statute proclaims the existence of an emergency. The Act is to be effective for one year—July 1, 1933 to July 1, 1934.

It is well-settled that the obligations of contracts must yield to the exercise of the police power reserved to the States.

Home Building & Loan Assn. v. *Blaisdell*, 290 U. S. 398.

Vested rights cannot inhibit the proper exertion of this power.

Nebbia v. *New York*, 291 U. S. 502.

Conclusion.

It is respectfully submitted that the appellee's motion to dismiss the appeal and, in the alternative, to affirm the judgment of the State court, should prevail.

REINHOLD HEKELER,
Attorney of Appellee.

SAUL NEMSER,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 455

LUCY ASKAM ET AL.,

Appellants,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK AND STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

REINHOLD HEKELER,
SAUL NEMSER,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

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LUCY ASKAM ET AL.,

Appellants,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK AND STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY.

Appellees.

APPELLEE'S STATEMENT PURSUANT TO RULE 12, PARAGRAPH "3" OPPOSING JURISDICTION, WITH MOTION TO DISMISS AND IN THE ALTERNATIVE MOTION TO AFFIRM.

The appellee, Board of Education of the Town of West New York, pursuant to the provisions of Rule 12, Paragraph 3 of this Court, writes down the following matters and grounds making against the jurisdiction of this Court asserted by appellants.

I.

The appeal in the instant case presents for review, the decision of a State Court, construing a State statute and determining that it is not violative of the State Constitu-

tion. The gist of the State Court's opinion involves purely a matter of local law. A Federal question was not decided by the State Court, nor was its decision necessary to a determination of the cause.

The opinion of the New Jersey Supreme Court is officially reported in 115 N. J. L. 310, and was affirmed by the New Jersey Court of Errors and Appeals in 116 N. J. L. 416.

The Statutes involved are P. L. 1909, p. 398, being Chapter 243 of the New Jersey Public Laws of 1909 (the so called Teacher's Tenure Act) and P. L. 1933, p. 24, being Chapter 12 of the New Jersey Public Laws of 1933, which latter Act the New Jersey Court held in its opinion, to have modified and repealed part of the 1909 Tenure Act.

The 1909 Statute reads as follows:

> "A Supplement to an act entitled "An act to establish a thorough and efficient system of free public schools and to provide for the maintenance, management and support thereof," approved October nineteenth, one thousand nine hundred and three.
>
> Be it Enacted by the Senate and General Assembly of the State of New Jersey:
>
> 1. The service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board; provided, that the time any teacher, principal, supervising principal has taught in the district in which he or she is employed at the time this act shall go into effect, shall be counted in determining such period of employment. No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred

against him or her, signed by the person or persons making the same, and filed with the secretary or clerk of the Board of Education having charge of the school in which the service is being rendered, and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing. Charges may be filed by any person, whether a member of said school board or not.

2. Said Board of Education shall have power to issue writs of subpoena on behalf of either party to compel attendance of witnesses to testify before said board in the matter under investigation, which subpoena shall be issued under the seal of said board and be signed by the secretary or clerk thereof, and shall be served in the same manner as subpoenas issued out of the Courts of Common Pleas of this State, and every person who refuses or neglects to obey the command of such a writ, or, who, after appearing, refuses to be sworn and testify, shall in either event be liable to a penalty of fifty dollars, to be sued for in the name of said board in any court of competent jurisdiction, which penalty when collected shall be paid to the treasurer or custodian of moneys of said board. Any member of said board is hereby authorized to administer oaths to such witnesses as may appear or be brought before it, and any person who shall have been so sworn and who shall testify falsely, shall be guilty of perjury.

3. Nothing herein contained shall be held to limit the right of any school board to reduce the number of principals or teachers employed in any school district when such reduction shall be due to a natural diminution of the number of pupils in said school district; and, provided further, that the service of any principal or teacher may be terminated without charge or trial who is not the holder of a proper teacher's certificate in full force and effect.

4. This act shall take effect September first, one thousand nine hundred and nine.

Approved April 21, 1909."

The 1933 Statute reads as follows:

"An Act respecting the salaries or compensation of officers and employees of and persons holding positions in the several school districts of this State.

Whereas, due to present economic conditions, an emergency exists which requires that the board of education of every school district in this State be enabled to fix and determine, by resolution, the amount of salary or compensation to be paid to officers and employees of and persons holding positions in any such school district; therefore,

Be it Enacted by the Senate and General Assembly of the State of New Jersey:

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member, he or his beneficiary shall be entitled to the same benefits as if his salary or compensation had not been changed; *and Provided, Further,* that in fixing salaries or compensation there shall be no discrimination among or between individuals in the same class of service; provided, however, that the existing minimum salary of teachers of seventy dollars per month shall not be changed.

2. Nothing in this act contained shall be construed to affect or impair the continuity of position or employment under any tenure of office statute.

3. This act shall take effect immediately.

Approved February 4, 1933."

The resolution adopted by appellee, pursuant to the authority of the 1933 Act, reads as follows:

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all figures being inclusive; provided, however, that the salary of any elementary school teacher shall not be reduced below the minimum of $1200 per annum, and

the salary of any high school teacher shall not be reduced below the minimum of $1600 per annum.

(Sgd.) Arthur H. Einbeck.

Dated June 23, 1933."

A perusal of the State Court's opinion indicates that it construed the 1909 Act, not as conferring irrevocably vested contractual obligations on the school teachers of New Jersey, but on the contrary, that the statute established "a legislative status for teachers" and that the status of tenure teachers is "in essence dependent on a statute * * *" which the legislature at will may abolish, or whose emoluments it may change"; that the 1933 Act constitutes "an implied partial repealer or amendment to the tenure act of 1909" and is not repugnant to the provisions of the Constitution of the State of New Jersey inhibiting the impairment of obligations of contract.

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It is respectfully submitted that jurisdiction should be declined because a Federal question of substance was neither presented to nor decided by the State court, nor was a Federal question necessary to the determination of the cause.

II.

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Now comes the appellee, the Board of Education of the Town of West New York, by Saul Nemser, its counsel, and moves this Court to dismiss the appeal for want of jurisdiction; and in the alternative, said appellee moves to

affirm the judgment of the New Jersey Court of Errors and Appeals as the Last Resort in all causes, upon the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The appellants cite cases bearing on the question of tenure rights which clearly involve unwarranted acts of school boards while a "Tenure Act" was in full force and effect, *without amendment or modification*, or which involve cases where teachers have made contributions to a pension or retirement fund and therefore, had acquired certain vested property rights in such fund, which obviously, could not be diminished or disturbed to the prejudice of the contributors by subsequent legislation.

None of these cases are in point and fall far short of supporting appellants' position.

In none of these cases was the issue one which questions the right of the State to repeal, amend or modify its own laws. None of these cases have any relevancy to a situation where the State as the Sovereign power, modifies its own law—the Tenure Act—to affect salaries to accrue in the future—beginning with and during a new and subsequent school year.

The reductions in salary varied from 10% to 15% and became effective for the school year next following the date of the adoption of the resolution. The 1933 Statute was enacted on February 4, 1933. The resolution reducing appellants' salaries, was adopted by the appellee on June 23, 1933, and became effective during the new fiscal year July 1, 1933—July 1, 1934. As a practical matter and due to the intervening summer vacation, the appellants were not affected until school opened on September 1, 1933.

The action of the New Jersey Legislature in modifying the 1909 Tenure Act, for the limited period of one year, did not impinge upon any of the alleged rights of the appellants.

"There can be no vested right in an existing law which precludes its change or repeal". 12 *C. J.* 958.

According to the New Jersey court's rational construction of the Tenure Act of 1909, it conferred upon the appellants and other school teachers of the State of New Jersey the right to be employed after the expiration of a three year probationary period during good behavior and efficiency without dismissal or reduction in salary, except for the causes enumerated in the statute. This conferred upon appellants a *personal* right or privilege which they could neither assign nor transfer, and which the legislature could withdraw entirely or in part, as it pleased.

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Rector, etc., of Christ Church, Philadelphia, v. *County of Philadelphia*, 24 How. 300.

The teachers did nothing other than to accept another year's employment at the hands of the local Board of Education and all of them accepted such employment at the reduced salaries without protest.

If the construction placed on the 1909 Act by the New Jersey court in the case at bar is to prevail, then clearly appellants have no contract and never had a contract in the full sense of the term. Thus a contractual *obligation* could

not possibly be impaired and therefore, a question could not possibly arise under the contract clause of the Federal Constitution.

At any rate, if the appellants' contentions are tenable, and even if it be assumed that they acquired vested contractual rights under the Act of 1909 which the State was powerless to modify—still the 1933 statute constitutes proper emergency legislation.

The Preamble to the 1933 Statute proclaims the existence of an emergency. The Act is to be effective for one year—July 1, 1933 to July 1, 1934.

It is well-settled that the obligations of contracts must yield to the exercise of the police power reserved to the States.

Home Building & Loan Assn. v. *Blaisdell,* 290 U. S. 398.

Vested rights cannot inhibit the proper exertion of this power.

Nebbia v. *New York,* 291 U. S. 502.

Conclusion.

It is respectfully submitted that the appellee's motion to dismiss the appeal and, in the alternative, to affirm the judgment of the State court, should prevail.

REINHOLD HEKELER,
Attorney of Appellee.

SAUL NEMSER,
Of Counsel With Appellee.

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No. 455

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vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK and STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY, *Appellees.*

BRIEF IN OPPOSITION TO MOTION TO DISMISS THE APPEAL AND, IN THE ALTERNATIVE, TO AFFIRM.

ROBERT H. MCCARTER,
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Appellees.

BRIEF IN OPPOSITION TO MOTION TO DISMISS THE APPEAL AND, IN THE ALTERNATIVE, TO AFFIRM.

In the motion to affirm on the ground that the questions on which the decision depends are so unsubstantial as not to need further argument, several contentions are advanced upon which it may be helpful to comment. It is first contended that the jurisdictional statement filed by the appellants pursuant to Rule 12 cites cases dealing with the employment of school teachers which are not in point because not involving legislative attempts to repeal or modify earlier statutes. By way of supplement to what has been said in the jurisdictional statement, and without repeating citations, attention is called to the fact that the school cases there cited, whether or not involving subsequent legislation, are authority for the proposition that the employment of teachers in the public schools is con-

tractual and that this case, therefore, is not within the well established rule that the compensation of a public officer can be reduced during his term of office by legislation.

It is also contended that Chapter 243 of the New Jersey Laws of 1909 conferred upon the appellants only personal rights which are not entitled to constitutional protection. This contention is unsound. Employment contracts between governmental units and individuals are as much within the protection of the Constitution as other contractual relationships. *Hall* v. *Wisconsin*, 103 U. S. 5.

We respectfully submit that there is a substantial question here as to the extent of the contracts between the appellants and the West New York Board of Education. When the appellee Board of Education employed the appellants for a fourth year of teaching service, and the appellants chose to accept such employment, Chapter 243 of the New Jersey Laws of 1909 was in force, and provided that after the expiration of three consecutive years of employment in a particular school district no teacher should be dismissed or subjected to reduction of salary except for certain stated reasons. Can it be said that the parties did not accept the existing Statute as the basis for their agreement or that they did so with the idea that the Statute was subject to some reserved power in the State to alter it at will? These questions have substance, which is all that need be shown at this stage of the case. More than fifty years ago Mr. Justice Miller, speaking for the Court in *New Jersey* v. *Yard*, 95 U. S. 104, 113 *et seq.*, aptly described the problem created by a situation like the present one. He said:

> "It may safely be said that in far the larger number of cases brought to this court under that clause of the Constitution, [the Contract Clause] the

question has been as to the existence and nature of the contract, and not the construction of the law which is supposed to impair it; and the greatest trouble we have had on this point has been in regard to what may be called legislative contracts,—contracts found in statute laws of the State, if they existed at all. It has become the established law of this court that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the State within the protection of the clause referred to of the Federal Constitution.

"The difficulty in this class of cases has always been to distinguish what is intended by the legislature to be an exercise of its ordinary legislative function in making laws, which, like other laws, are subject to its full control by future amendments and repeals, from what is intended to become a contract between the State and other parties when the terms of the statute have been accepted and acted upon by those parties. This has always been a very nice point; and, when the supposed contract exists only in the form of a general statute, doubts still recur, after all our decisions on that class of questions."

Legislation applying to a contracting municipal corporation is no exception to the general rule that the obligation of a contract is determined by the laws in force at its making. *Worthem Co.* v. *Kavanaugh,* 295 U. S. 56; *Hubert* v. *New Orleans,* 215 U. S. 170.

The portion of the present motion which urges the dismissal of the appeal for want of jurisdiction is based upon a statement opposing jurisdiction which has been filed pursuant to paragraph 3 of Rule 12. It is asserted in the state-

ment that, since the courts of New Jersey have ruled against the existence of a contract, the decision of the constitutional questions raised was completely avoided. It is hardly necessary to say that this argument overlooks the established rule that in cases arising under the Contract Clause of the United States Constitution, it must always be determined whether or not there was a contract. Such determination is a part of the constitutional question.

It is respectfully submitted that the motion should be denied.

ROBERT H. MCCARTER,
Counsel for Appellants.

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Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK and STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY.

No. 455.

LUCY ASKAM, *et al.*,

Appellants,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK and STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY.

BRIEF FOR APPELLANTS.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 454.

JAY B. PHELPS,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK and STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY.

No. 455.

LUCY ASKAM, *et al.*,

Appellants,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK and STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY.

APPEALS FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF FOR APPELLANTS.

I.

Opinions of the Courts below.

The New Jersey Supreme Court handed down a single opinion applicable to both cases. It is reported in 115 N. J. L. 310 (R. 24). No additional opinion was written by

The New Jersey Court of Errors and Appeals, the judgments being affirmed by memorandum. The memorandum of affirmance in *Phelps* v. *Board of Education of the Town of West New York, et al.* (No. 454), is reported in 116 N. J. L. 412 (R. 31). The similar memorandum in *Askam, et al.* v. *Board of Education of the Town of West New York, et al.* (No. 455), is reported in 116 N. J. L. 416 (R. 72).

II.

Statement of the case.

All of the appellants are teachers or principals in the public schools of West New York, New Jersey. They challenge here, as they have below, the constitutionality of Chapter 12 of the New Jersey Laws of 1933 (P. L. 1933, page 24) by which the legislature undertook to authorize boards of education throughout the State to reduce the salaries of their employees during the period beginning July 1, 1933 and ending July 1, 1934, and under which legislation the Board of Education of The Town of West New York reduced the salaries of the appellants.

On February 4, 1933, when Chapter 12 of the New Jersey Laws of 1933, *supra*, was approved, the appellants had all been employed for more than three consecutive years in the public schools of West New York. (Tables, R. pp. 7-16, giving dates of employment and approximate years of service of all faculty members, including the appellants.) As a result of such length of employment, Chapter 243 of the New Jersey Laws of 1909 (P. L. 1909, p. 398; 4 N. J. Comp. Stat., pp. 4763, 4764, Secs. 106a, 106b, 106c) had become applicable to the relationship between each of the

appellants and the West New York Board of Education. That statute, which is at the foundation of the argument to be made, reads in part as follows:

> "The service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board; * * * No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons making the same, and filed with the secretary or clerk of the Board of Education having charge of the school in which the service is being rendered, and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing."

The full text of the statute is given in Appendix A.

It is conceded that none of the appellants have been guilty of any of the offenses made a basis for salary reduction by the 1909 act, *supra;* namely, inefficiency, incapacity, conduct unbecoming a teacher or other just cause (R. 18 and 54).

On February 4, 1933, at a time when the West New York Board of Education was without real or apparent power to reduce the salaries of the appellants, except for the reasons provided in Chapter 243 of the Laws of 1909, *supra,*

the Governor of New Jersey approved Chapter 12 of the Laws of 1933, *supra*. That statute purports to authorize boards of education to reduce salaries for the period between July 1, 1933 and July 1, 1934. The preamble recites that "due to present economic conditions, an emergency exists" and the body of the statute reads in part as follows:

> "The board of education of every school district in this State shall have full authority, by resolution, to fix and determine the salaries and compensation to be paid to officers and employees of and persons holding positions in any such school district, between the first day of July, one thousand nine hundred and thirty three, and the first day of July, one thousand nine hundred and thirty four, notwithstanding any such person be under tenure or not."

For the entire statute and preamble see Appendix B.

In reliance upon the statute just referred to, the West New York Board of Education, on June 23, 1933, adopted resolutions reducing the salaries of its employees, including the appellants, during the period between July 1, 1933 and July 1, 1934. For the text of the resolutions see R. 18, par. 3, and R. 19, par. 5. That they were adopted in reliance upon Chapter 12 of the Laws of 1933, *supra*, is conceded. (R. 3, par. 5, admitted by R. 6, par. 4; and R. 50, par. 45, admitted by R. 52, par. 5.)

At this point the difference between the two cases may be noted. When offered salary at the reduced rate, Mr. Phelps, who is the sole appellant in Number 454, refused to accept it and the stipulation of facts includes a statement that he has not agreed, expressly or impliedly, to the reduction of his salary for the period in question (R. 20).

None of the appellants in the other case (No. 455) has agreed expressly to the reduction in salary but, with one exception, they have cashed pay checks issued to them by the Board of Education (R. 61). Except for this difference in the degree of protest made, (which is immaterial, we contend) the cases are identical in their general outlines.

The situation of Mr. Phelps (appellant in No. 454) is typical. By contract dated May 4, 1921 he was employed to teach in the public schools of West New York for the period of a year. That contract was renewed, with salary increases, in the two following years. It was likewise renewed at the beginning of the fourth year, that renewal being within the scope of Chapter 243 of the Laws of 1909, *supra*. From that time until the adoption of Chapter 12 of the Laws of 1933, *supra*, which was followed by the action reducing salaries, Mr. Phelps' contract of employment continued in full force and effect with no changes except certain salary increases granted to him by his employer, the West New York Board of Education. These facts are set forth in the petition of appeal addressed to the New Jersey Commissioner of Education (R. 2, *et seq.*) and admitted by the answer thereto (R. 5 and 6); also in the stipulation of facts (R. 18).

The appellants in the Askam case (No. 455) are in a similar position, as shown by the petition of appeal addressed to the New Jersey Commissioner of Education (R. 37, *et seq.*), the answer thereto (R. 52) and the stipulations of fact (R. 53 and R. 6). This generalization is subject to the minor exception however that the West New York Board of Education contends that two of the large group of appellants, although having been engaged

in classroom teaching at various times and being qualified to do such teaching, were assigned to clerical positions and so, in 1933, were not within the scope of Chapter 243 of the Laws of 1909, *supra* (R. 57, par. 6; R. 59, par. 7).

The cases were first presented to the Commissioner of Education of New Jersey and then to the State Board of Education. This was done pursuant to the School Law. 4 N. J. Comp. Stat., p. 4727, Sec. 10. Both the Commissioner and the State Board refused to pass upon the constitutionality of Chapter 12 of the Laws of 1933, *supra* (R. 21, 22, 62, 66 for the decisions). The cases were then taken to the New Jersey Supreme Court by writs of certiorari, the State Board of Education becoming a nominal party defendant (R. 1 and 36). The New Jersey Supreme Court held the statute constitutional, and upon that result being affirmed by the Court of Errors and Appeals, the present appeals were taken.

III.

Specification of errors.

(R. 78-81)

Point I. Chapter 12 of the New Jersey Laws of 1933 (P. L. 1933, page 24), approved February 4, 1933, is unconstitutional and void as repugnant to Article 1, Section 10, of the Constitution of the United States, in that it impairs the obligations of existing contracts of the appellants.

Point II. The aforesaid Statute of the State of New Jersey is unconstitutional and void as repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the

United States, in that it deprives the appellants of their property without due process of law.

Point III. The said Statute of the State of New Jersey is unconstitutional and repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States in that it denies the appellants the equal protection of the laws.

Point IV. The New Jersey Court of Errors and Appeals erred in deciding in favor of the validity of the aforesaid Statute of the State of New Jersey.

IV.

Argument.

A. Chapter 243 of the New Jersey Laws of 1909 entered into and became a part of the employment contracts of the appellants.

The New Jersey courts rejected this proposition. The State Supreme Court said (R. 27; 115 N. J. L. at 313):

> "The act of 1909 * * * provides, among other things, that no teacher shall be dismissed or subjected to reduction of salary except for certain causes after charges and a trial. That established a legislative status for teachers, but we fail to see that it established a contractual one that the legislature may not modify. If the argument now made is sound, the act of 1909 is irrepealable as to any teacher holding his position by tenure at any time thereafter. * * * The status of tenure teachers, while in one sense perhaps contractual, is in essence dependent on a statute, like that of the incumbent of a

> statutory office, which the legislature at will may abolish, or whose emoluments it may change."

That is the essence of the opinion below. The error lies in this: the employment of teachers, both before and after becoming subject to a statute like Chapter 243 of the New Jersey Laws of 1909, is contractual; they do not occupy public offices which may be abolished or for which the compensation may be reduced as the legislature sees fit. It is not necessary to go out of New Jersey for authority. In *Gowdy* v. *State Board of Education*, 84 N. J. L. 231 (1913), a teacher, who had been employed in the Paterson public schools for more than three consecutive years, contended that a resolution of the Paterson Board of Education providing for the payment of salaries in twelve, rather than ten, annual installments, would amount to a reduction in her compensation and so be illegal under Chapter 243 of the Laws of 1909; 4 N. J. Comp. St., p. 4763, Sec. 106a. In sustaining the teacher's contention the New Jersey Supreme Court referred several times to her "contract" and summed up its conclusion, at page 233, in the following sentence:

> "We think that such a result is in effect an impairment of the contract and in clear violation of section 106a."

The Court of Errors and Appeals affirmed this decision on the opinion of the Supreme Court. 85 N. J. L. 726.

Allen v. *Board of Education*, 81 N. J. L. 135, and *Ball* v. *Trustees*, 71 N. J. L. 64 (cases to be discussed more in detail later), hold that teachers have contractual rights in pension plans provided for by statute.

That a teacher is a contractual employee, not a public officer, was held in *Mootz* v. *Belyea*, 60 N. D. 741 (also re-

ported and annotated in 75 A. L. R. 1347). There the court said, at page 744,

> "When a teacher is employed by a school district she is not employed as an officer and she does not become an officer. Her rights are measured by the terms of her contract. As said in *Board of Education* v. *State*, 100 Wis. 455, 76 N. W. 351, the teacher 'was a mere employee, and not an officer of the district in question, and had no official relations to it. His services were to be rendered in consideration of a certain stipulated compensation and he was not an officer, within the meaning of the constitution and laws.'
>
> The relationship between the teacher and school directors is purely contractual. *Clune* v. *School District*, 166 Wis. 452, 166 N. W. 11, 6 A. L. R. 736; *State ex rel. O'Neil* v. *Blied*, 188 Wis. 442, 206 N. W. 213.
>
> *Heath* v. *Johnson*, 36 W. Va. 782, 15 S. E. 980, says: 'The occupation of a teacher of a free school in this State is not a public office, but an employment.'
>
> In *State ex rel. Lewellen* v. *Smith*, 49 Neb. 775, 69 N. W. 114, it is said: 'A contract to teach in one of the free schools of the ordinary districts is one of employment. The district, represented by the board, is an employer, and the teacher an employee. The teacher in such schools is not a public officer.' "

The annotation in 75 A. L. R. 1347, 1352 (*supra*) is to the same effect.

No statute was involved in *Mootz* v. *Belyea, supra*, but the same result has been reached where teachers' employments have been controlled by statutes similar to Chapter 243 of the New Jersey Laws of 1909 (Appendix A). *Steinson* v. *Board of Education of New York City*, 165 N. Y.

431 (1901), was a suit by a dismissed teacher for salary allegedly due him during the six year period preceding the commencement of his action. He had been dismissed on March 12, 1890 and commenced suit July 15, 1896. On appeal to the State Superintendent of Schools it had been held that the plaintiff could be removed as a teacher only after trial with notice, "in accordance with the provisions of the Consolidation Act". In this situation the Court of Appeals held that the plaintiff was entitled to a judgment for salary. Judge Landon said for the Court (pp. 434, 435),

> "The plaintiff was not an officer, but an employe. His employment was contractual, and his proper remedy is by action. * * * The plaintiff's employment was subject to no other limit of time than the power of removal for cause vested in the defendant and its officers, and the power of the state superintendent to revoke his state license. The plaintiff was discharged without right or cause, and is entitled to recover."

To the same effect see *Martin* v. *Fisher*, 108 Cal. App. 34; *School City of Elwood* v. *State*, 203 Ind. 626; *Kostanzer* v. *State*, 205 Ind. 536; *State* v. *Board of Milwaukee*, 190 Wis. 570.

In *Martin* v. *Fisher*, *supra*, the California court said, at page 39,

> "Respondent must find her authority for a judgment in the right given her by section 1609 of the Political Code to continue her duties as a permanent teacher in the schools of the district. This right finds its origin in a contract between herself and the board of trustees of the district, together with two years satisfactory service as a teacher under the terms of her contract or contracts. Therefore the cause of action finds its source, first, in a contract,

> second, in services satisfactorily performed under the terms of the contract, and, third, in the provisions of the law.
>
> Originally the relation of the district and respondent was that of employer and employee. The provisions of section 1609 of the Political Code merely served to extend the term of the contract of employment by operation of law and did not change the relation of the employer and employee. In reality the suit of respondent is to collect her salary under a contract, the terms of which had been extended by operation of law.
>
> The position of a teacher in the public schools of California is not an office. It is an employment by contract made between the teacher and the district."

The contractual nature of the relationship between the appellants and their employer, the Board of Education of West New York, is demonstrated by the language of the New Jersey School Law (4 N. J. Comp. St. 4724). Article IV., Sec. VII., Parg. 6, of the New Jersey Constitution, reads in part:

> "The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years."

Pursuant to that constitutional provision there was adopted "An Act to establish a thorough and efficient system of free public schools, and to provide for the maintenance, support and management thereof". (P. L. 1903 [2d Sp. Sess.] p. 5; 4 N. J. Comp. St. 4724). Section 106 of the act provides for the "employment" of teachers and makes repeated ref-

erence to the "contract" of employment. The full text of the section is set out in Appendix C.

After the appellants had each completed the required period of probationary service on an annual basis, the West New York Board of Education had the choice of terminating their contracts of employment or of continuing them in its employ, thereby giving up its right to reduce their salaries at any time in the future. The Board of Education, in this situation, chose to continue the appellants as its employees. Similarly, each of the appellants, at the end of the required period of probationary service, had the choice between seeking other employment or continuing as employees of the West New York Board of Education on the permanent basis provided by the statute. They also chose to remain members of the faculty of the West New York public schools.

Laws in force at the time and place of the making of a contract enter into and form a part of it. *Northern Pacific Ry.* v. *Wall*, 241 U. S. 87, 91; *Fisk* v. *Jefferson Police Jury*, 116 U. S. 131; *Coombes* v. *Getz*, 285 U. S. 434; *Home B. & L. Assn.* v. *Blaisdell*, 290 U. S. 398, 429 *et seq.*; *Vanderbilt* v. *Brunton Piano Co.*, 111 N. J. L. 596, 597.

In *Ball* v. *Trustees*, 71 N. J. L. 64, (*supra*), Swayze, J., 1904, the State Supreme Court had before it a teacher's claim to pension benefits. An act of 1896 gave annuities to teachers incapacitated after 20 years of service. In 1899 the statute was amended to make the annuity depend upon approval by the board of trustees of the retirement fund. The opinion of the court states the problem and the solution as follows, pages 65 and 66:

> "The question for solution, therefore, is whether the rights of the plaintiff acquired by her under the

act of 1896 can be taken away by subsequent legislation.

The legal relation between the plaintiff and the defendant is that of contract. By electing to accept the provisions of the act of 1896, and making or tendering the necessary payment, the plaintiff, when incapacitated, became entitled to the annuity, which, although not a personal obligation of the board of trustees, was payable to her out of the fund. The terms of the agreement are to be ascertained by reference to the statute. When this agreement was once made, it could not be altered without the consent of both parties thereto and upon sufficient consideration. The fact that the terms of the agreement were embodied in an act of the legislature does not change its essential character as a contract, and it was beyond the power of the legislature to impair the obligation of this contract by subsequent legislation.

* * * * * *

"What the act of 1899 attempted to do was to impair the obligation of an existing contract, and this is beyond the power of the legislature."

The *Ball* case was followed in *Allen* v. *Board of Education*, 81 N. J. L. 135 (*supra*), Voorhees, J., Sup. Ct., 1911. There a teacher brought suit for the portion of her salary which had been deducted by the defendant in reliance upon the pension fund provisions of the School Law (P. L. 1907, p. 365). The court upheld the right of the defendant to deduct a portion of the plaintiff's salary for the pension fund, saying at page 137, *et seq.*:

"By the amendatory act of 1907 (Pamph. L., p. 374, Sec. 221, Parg. 4) a new section was enacted, reading as follows:

'Every person who shall be appointed to any position hereinafter designated, on or after the

first day of January, one thousand nine hundred and eight, shall become a member of the fund by virtue of such appointment.'

"This statute was in force when the contract between the plaintiff and defendant was entered into and it formed a part of such contract and was one of the terms of employment of the plaintiff. *The creation of this fund was an important public measure which may well be considered as tending to make the system of free schools established by the act both thorough and effective by rendering the position of teacher a more desirable one because of the advantages arising out of the fund. It was a public scheme designed for the betterment of a branch of the service.* It was offered to persons seeking and desirous of becoming teachers, who were at liberty at their option to accept such positions subject to the terms of the statute, or to refuse them. If they did accept, then the provisions of the act became, by such acceptance, binding upon them.

"We conclude, therefore, that the act, aside from any constitutional invalidity, became a part of the contract entered into between the parties to this suit * * *."

The sentences which we have italicized express a thought which applies with even greater force to Chapter 243 of the New Jersey Laws of 1909. That Chapter made it possible for our boards of education to offer their good teachers, tested by three years of probationary service, assurance against dismissal or reduction in salary except for good cause. Thousands of teachers—the appellants included—have been offered and have accepted employment on those terms. Chapter 243 of the New Jersey Laws of 1909 became just as much a part of their contracts as the teachers' pension act.

Employment contracts between governmental units and individuals are within the protection of the United States Constitution. *Hall* v. *Wisconsin,* 103 U. S. 5. There Mr. Hall was employed by written contract to make a geological, mineralogical and agricultural survey of the state. The statute providing for the survey fixed a maximum rate of compensation. Before the completion of the contract the statute was repealed. Held, that the contract was enforceable in spite of the repealing of the statute. The Supreme Court of California has ruled that a teacher who has earned permanent employment under the California statute obtains vested rights which remain unaffected by the repeal of the law under which the permanent employment came into existence. *Klein* v. *Board of Education,* 1 Calif. (2d) 706, 708. Wisconsin holds that the pension rights of teachers established by statute are contractual and cannot be impaired by later legislation. *State* v. *Blied,* 188 Wis. 442. That decision was approved and applied in a case involving a teacher's right to permanent employment: *State* v. *Board of School Directors of Milwaukee,* 190 Wis. 570, 575 (*supra*). There the court said,

> "It is sufficient for the disposition of this case to hold that, when the relator had performed continuous service as a teacher from September, 1921, until and including the end of the school year on June 19, 1925, there having been no unfavorable action by committee or board, she became, by virtue of such service and said statute, permanently employed, and her status as such, with the substantial rights belonging thereto, became fixed, and could only be abrogated or disturbed in the method prescribed in said statute. That the status of one permanently employed as a teacher under such a system and with the rights so fixed cannot be impaired by sub-

> sequent legislation, as held in *State* v. *Blied,* 188 Wis. 442, 206 N. W. 213, manifestly requires a holding that such status or contract right cannot be destroyed or impaired by the school board, which is but the administrative arm of the state for carrying on the governmental function of education, except and unless such administrative body has the express power given it by statute to effect such changes."

In *Fisk* v. *Jefferson Police Jury,* 116 U. S. 131 (*supra*), a district attorney who had served his allotted term obtained judgments for the salary and fees due to him from the parish. Subsequent to the end of the term of office the State Constitution had been revised to provide for a lowered maximum rate of taxation. Under the previous law it would have been proper for the police jury, the governing body of the parish, to assess sufficient taxes to provide for the payment of the judgments. Under the revised Constitution the limit of taxation had already been reached. It was held that, the term of office having been completed and the services rendered, a completed contract had come into existence, perfect in its obligation and resting on the remedies which the law at that time gave for its enforcement, and that the obligation of the contract was impaired by the revised state constitution.

Holders of municipal bonds are likewise assured, by the contract clause, that the taxing provisions in existence at the time of the issuance of the bonds will remain in force as to their essential parts. *Worthen Co.* v. *Kavanaugh,* 295 U. S. 56; *Hubert* v. *New Orleans,* 215 U. S. 170. In the Worthen case, Mr. Justice Cardozo said for the Court, at page 60, concerning the statutory amendments in question:

> "With studied indifference to the interests of the mortgagee or to his appropriate protection they have

taken from the mortgage the quality of an acceptable investment for a rational investor''.

In the cases at bar, Chapter 12 of the New Jersey Laws of 1933 has taken from teachers, many of whom have invested the better part of their lives in the service of the various school districts of the state, a most important feature of the investment made.

The New Jersey Supreme Court, in the opinion below (R. 28; 115 N. J. L. at 314), cites only one case. It is *Vroom* v. *Board of Education*, 79 N. J. L. 46. There a teacher claimed that, when he had been employed 36 years before, it had been agreed between him and the board of education that he should hold his position during good conduct and efficiency. A justice of the State Supreme Court, sitting alone, held that such a contract, if made, was beyond the statutory authority of the defendant board. The case arose before the passage of Chapter 243 of the Laws of 1909, *supra*, and we submit that it has no application to the present situation.

B. The appellants' contracts of employment are not subject to any reserved power of the state to authorize the reduction of salaries.

Granting that Chapter 243 of the New Jersey Laws of 1909 (Appendix A), entered into and became a part of the appellants' contracts, it may be contended that such contracts are subject to a reserved power to authorize salary reductions. The statute itself expressly reserves the power to reduce salaries for the causes and in the manner there stated. There is also an express reservation of the power

to dismiss teachers for certain causes, including the falling off of enrollment. These express reservations amply protect the State in performing its obligation to furnish a thorough and efficient system of public schools.

There is no precedent for implying a reservation of power to authorize such reduction of salaries. That the action taken may be for the public welfare is not a sufficient basis for implying such a reservation. *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426. There, in commenting upon *Home B. & L. Assn.* v. *Blaisdell,* 290 U. S. 398, Mr. Chief Justice Hughes said for this Court, at page 433:

> "But we also held that this essential reserved power of the State must be construed in harmony with the fair intent of the constitutional limitation, and that this principle precluded a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. We held that when the exercise of the reserved power of the State, in order to meet public need because of a pressing public disaster, relates to the enforcement of existing contracts, that action must be limited by reasonable conditions appropriate to the emergency. This is but the application of the familiar principle that the relief afforded must have reasonable relation to the legitimate end to which the State is entitled to direct its legislation."

If the West New York Board of Education had contracted for a supply of coal over a stated period, could the New Jersey legislature have validly authorized a reduction in the contract price without the consent of the other party? The answer obviously must be negative. Yet it might well be urged in defense of such action that it was

for the public welfare, resulting in economy in school administration.

The preamble to Chapter 12 of the New Jersey Laws of 1933 (Appendix B) recites that,

> "Due to present economic conditions, an emergency exists which requires that the board of education of every school district * * * be enabled to fix and determine, by resolution, the amount of salary or compensation, to be paid to officers and employees * * *."

The statute itself limits the authority conferred to the period between July 1, 1933 and July 1, 1934, one year.

In *Home B. & L. Assn.* v. *Blaisdell* (*supra*), 290 U. S. 398, at 444 *et seq.*, there is stated the criteria to be applied in determining the constitutional validity of "emergency" legislation. They are, (1) An emergency must exist, (2) the legislation must be for the protection of a basic interest of society, (3) the relief granted must be of a character appropriate to the emergency and can be granted only upon reasonable conditions, (4) the conditions in the particular case must be reasonable, and (5) the legislation must be temporary. The reasonableness of the Minnesota mortgage moratorium statute involved was discussed as follows, page 445:

> "As already noted, the integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee-purchaser to title or to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as they were under the prior law. The mortgagor

during the extended period is not ousted from possession but he must pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness. The mortgagee purchaser during the time that he cannot obtain possession thus is not left without compensation for the withholding of possession. Also important is the fact that mortgagees, as is shown by official reports of which we may take notice, are predominantly corporations, such as insurance companies, banks, and investment and mortgage companies. These, and such individual mortgagees as are small investors, are not seeking homes or the opportunity to engage in farming. Their chief concern is the reasonable protection of their investment security. It does not matter that there are, or may be individual cases of another aspect. The legislature was entitled to deal with the general or typical situation. The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors. The legislation seeks to prevent the impending ruin of both by a considerate measure of relief."

Practically everything said in the foregoing quotation is untrue concerning the present cases. The integrity of the contract debt of the West New York Board to the appellants is impaired. Where Mr. Phelps, for example, received $3,200 for the school year 1932-1933, he received only $2,784 the following year (R. 4). He gets no interest on the balance and he is not to get the balance at a later date. And apparently the same sort of thing will go on indefinitely for Chapter 12 of the Laws of 1933 has already been renewed three times. P. L. 1933, Chapter

449; P. L. 1935, Chapter 6; P. L. 1936, Chapter 27. The action here complained of is not like postponing the remedy of the holder of a mortgage with ample compensation in the form of interest or rent during the postponement. To use the same terms, it is like a legislative assertion that the holder of the mortgage must immediately accept in full satisfaction a certain percentage of the mortgage debt with no effort whatever made to compensate for the sacrifice and with no effort whatever made to provide for full payment in the future.

In addition, it is significant that the various renewals of the statute to July 1, 1937, *supra*, omit the recital that an emergency exists. Another objection to the "emergency" theory arises out of the fact that the West New York Board of Education, in its resolutions (R. 18, 19), was entirely silent concerning the existence of any emergency in the West New York school district. Also, the declaration of emergency is in the preamble, not the body of the statute. This deprives the declaration of efficacy. *Yazoo R. R. Co.* v. *Thomas*, 132 U. S. 174.

For all of these reasons we submit that the contracts of the appellants are not subject to any reserved power, either on an "emergency" theory or otherwise, to reduce salaries.

C. Chapter 12 of the New Jersey Laws of 1933 is repugnant to Article 1, Section 10, of the Constitution of the United States, in that it impairs the obligations of existing contracts of the appellants.

This conclusion follows from the reasons given and authorities cited under Points A and B, above. There can be no question but that legislation authorizing the compulsory

reduction of the salary provided for by an employment contract impairs the obligation of that contract.

D. Chapter 12 of the New Jersey Laws of 1933 deprives the appellants of property without due process of law and denies to the appellants the equal protection of the laws.

Contractual rights are recognized as property. *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685. From the arguments advanced under Points A and B, above, it follows that the appellants have been denied due process of law. By legislative act (Chapter 12 of the Laws of 1933) a portion of a most important element of their contracts, namely, their right to compensation, has been taken from them.

The question of equal protection is similarily important. The action taken denies to the appellants the equal protection of the law, for it takes from them, as creditors of the school district, a part of their contract rights, while other creditors are not so affected. By the terms of the statute, one class, school employees, are made to suffer. Within the group of the appellants serious inequalities have arisen in applying the statute, as is shown by the table appearing at page 55 of the record. Inequalities within the entire faculty is shown by the tables at pages 7-16 of the record.

E. That the appellants in case No. 455 have taken payments at the reduced rate is not important.

This point was not touched upon by the courts below, but has been mentioned in the previous arguments and will perhaps be mentioned here. We contend that it has no

merit. *St. Louis etc. Ry.* v. *U. S.*, 268 U. S. 169, 175; *Kehn* v. *N. Y.*, 93 N. Y. 291; *Clark* v. *State*, 142 N. Y. 101; *Amsler* v. *McClure*, 238 Pa. 409, 413. These appellants have not agreed to the reduction (R. 61).

Conclusion.

It is, therefore, respectfully submitted that the judgments of the New Jersey Court of Errors and Appeals, which are under review in these two cases, should be reversed.

Ward J. Herbert,
Robert H. McCarter,
Counsel for Appellants.

Appendix A.

Chapter 243 of the New Jersey Laws of 1909, (P. L. 1909, p. 398; 4 N. J. Comp. St. pp. 4763 and 4764, Secs. 106a, 106b and 106c).

A Supplement to an act entitled "An act to establish a thorough and efficient system of free public schools and to provide for the maintenance, management and support thereof," approved October nineteenth, one thousand nine hundred and three.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. The service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board; PROVIDED, that the time any teacher, principal, supervising principal has taught in the district in which he or she is employed at the time this act shall go into effect, shall be counted in determining such period of employment. No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons making the same, and filed with the secretary or clerk of the Board of Education having charge of the school in which the service is being rendered, and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing. Charges may be filed by any person, whether a member of said school board or not.

2. Said Board of Education shall have power to issue writs of subpoena on behalf of either party to compel attendance of witnesses to testify before said board in the matter under investigation, which subpoena shall be issued under the seal of said board and be signed by the secretary or clerk thereof, and shall be served in the same manner as subpoenas issued out of the Courts of Common Pleas of this State, and every person who refuses or neglects to obey the command of such a writ, or, who, after appearing, refuses to be sworn and testify, shall in either event be liable to a penalty of fifty dollars, to be sued for in the name of said board in any court of competent jurisdiction, which penalty when collected shall be paid to the treasurer or custodian of moneys of said board. Any member of said board is hereby authorized to administer oaths to such witnesses as may appear or be brought before it, and any person who shall have been so sworn and who shall testify falsely, shall be guilty of perjury.

3. Nothing herein contained shall be held to limit the right of any school board to reduce the number of principals or teachers employed in any school district when such reduction shall be due to a natural diminution of the number of pupils in said school district; AND, PROVIDED FURTHER, that the service of any principal or teacher may be terminated without charge or trial who is not the holder of a proper teacher's certificate in full force and effect.

4. This act shall take effect September first, one thousand nine hundred and nine.

Approved April 21, 1909.

Appendix B.

Chapter 12 of the New Jersey Laws of 1933, (P. L. 1933, p. 24).

AN ACT respecting the salaries or compensation of officers and employees of and persons holding positions in the several school districts of this State.

WHEREAS, due to present economic conditions, an emergency exists which requires that the board of education of every school district in this State be enabled to fix and determine, by resolution, the amount of salary or compensation, to be paid to officers and employees of and persons holding positions in any such school district; therefore,

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. The board of education of every school district in this State shall have full authority, by resolution, to fix and determine the salaries and compensation to be paid to officers and employees of and persons holding positions in any such school district, between the first day of July, one thousand nine hundred and thirty-three, and the first day of July, one thousand nine hundred and thirty-four, notwithstanding any such person be under tenure or not; PROVIDED, HOWEVER, that no salary or compensation of any officer or employee of or person holding a position in any school district shall be increased between the first day of July, one thousand nine hundred and thirty-three, and the first day of July, one thousand nine hundred and thirty-four; AND PROVIDED, FURTHER, that if any such person be a member of the Teachers' Pension and Annuity Fund of the State of New Jersey, or any employees' pension fund, such person may continue to pay, or cause to be paid, into

such pension fund the same amount as if such salary or compensation had not been changed, and upon the death or retirement of such member, he or his beneficiary shall be entitled to the same benefits as if his salary or compensation had not been changed; and PROVIDED, FURTHER, that in fixing salaries or compensation there shall be no discrimination among or between individuals in the same class of service; PROVIDED, HOWEVER, that the existing minimum salary of teachers of seventy dollars per month shall not be changed.

2. Nothing in this act contained shall be construed to affect or impair the continuity of position or employment under any tenure of office statute.

3. This act shall take effect immediately.

Approved February 4, 1933.

Appendix C.

Section 106 of the New Jersey School Law, (P. L. 1903 [2d Spec. Sess.] p. 42; 4 N. J. Comp. St., p. 4762).

106. A board of education may make rules and regulations governing the engagement and employment of teachers and principals, the terms and tenure of such employment, and the promotion and dismissal of such teachers and principals, the salaries, and the time and mode of payment thereof, and may from time to time change, amend or repeal such rules and regulations. The employment of any teacher by such board, and the rights and duties of such teacher with respect to such employment, shall be dependent upon and shall be governed by the rules and regulations in force with reference thereto. If a board of education shall not have made rules and regulations as aforesaid, then no contract between such board of education and a teacher shall be valid unless the same be in writing, or partly written and partly printed, in triplicate, signed by the president and district clerk or secretary of the board of education and by the teacher. One copy thereof shall be filed with the board of education, one copy with the teacher and one copy with the county or city superintendent. Such contract shall specify the date when such teacher shall begin teaching, the kind and grade of certificate held by said teacher and the date when said certificate will expire, the salary, and such other matter as may be necessary to a full and complete understanding of the same. In every such contract, unless otherwise specified, a month shall be construed and taken to be twenty school days or four weeks of five school days each. The salary specified in every such contract shall be paid in equal monthly installments, not later than five days after the close of each month while the school shall be in session. Any contract or engagement between a board of education

and a teacher shall cease and determine and be of no effect against said board whenever said board shall ascertain by notice in writing received from the county or city superintendent or otherwise, that said teacher is not in possession of a proper teacher's certificate in full force and effect, notwithstanding the term or engagement for which such contract shall have been made may not then have expired. The State Superintendent of Public Instruction shall prepare and distribute blanks for contracts between boards of education and teachers.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 454.

JAY B. PHELPS,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK AND STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY,

Appellees.

No. 455.

LUCY ASKAM, *et al.*,

Appellants,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK AND STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY,

Appellees.

APPEALS FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF FOR APPELLEE, BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK.

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APPEALS FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF FOR APPELLEE, BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK.

Opinions Below.

The opinion of the New Jersey Supreme Court in both cases is officially reported in 115 N. J. L. 310 (R. 24). The *per curiam* opinions of affirmance in the New Jersey Court

of Errors and Appeals in *Phelps* vs. *Board of Education of the Town of West New York, et al.* (No. 454), is officially reported in 116 N. J. L. 412 (R. 31) and in *Askam* vs. *Board of Education of the Town of West New York* (No. 455), is officially reported in 116 N. J. L. 416 (R. 72).

Statutes Involved.

The Statutes involved are set forth in the Appendix, *infra,* pages 20-27.

Questions Presented.

1. Whether the Teachers Tenure Act—being Chapter 243 of the New Jersey Public Laws of 1909—providing that no principal or teacher shall be subjected to reduction of salary except for the causes and in the manner set forth in the statute, constitutes a legislative contract between the State and the Teachers, and confers irrevocably vested contractual rights on the appellant teachers.

2. Whether Chapter 12 of the New Jersey Public Laws of 1933 is violative of and repugnant to, the contract clause of the Federal Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment thereto, because it impairs the obligations of the legislative contract alleged to have been created by the Teachers Tenure Law of 1909, in that the 1933 Law partially repeals the provisions of the Tenure Law and permits a reduction in teachers' salaries.

3. Whether the 1933 Act is a proper exercise of the essential reserved power of the state, during the period of an emergent economic crisis.

Statement.

The appellants' statement of fact is substantially correct, but we desire to supplement the same by pointing out that the state law under attack on this appeal—Chapter 12 of the New Jersey Public Laws of 1933—was approved on February 4, 1933.

The resolution (R. 4) reducing appellants' salaries from ten to fifteen percent was adopted by the appellee on June 23, 1933, to become effective during the new fiscal school year July 1, 1933-July 1, 1934. The reductions in salary became effective for the school year next following the date of the adoption of the resolution. As a practical matter and due to the intervening summer vacation, the appellants were not affected until school opened on September 1, 1933.

It is true that the appellant, Phelps, in No. 454, refused to accept the reduced salary when offered (R. 20).

However, the ninety-four appellants in the *Askam* Case (No. 455) raised no objection or made no protest whatever until December 1933, when, without any prior notice to appellee, they appealed to the State Commissioner of Education (R. 37). In the interim, they cashed their pay checks and continued to do so during the entire school year 1933-1934. The appellants in both cases had knowledge or must be presumed to have had knowledge, of the Act of 1933 adopted in February of that year, and indubitably had knowledge of the adoption by the local school board on June 23, 1933 of the resolution reducing salaries. None of the appellants nor anyone else objected to the adoption of the resolution, although the school budget for the year 1933-1934 had been previously made up and given the widest publicity.

It may not be amiss to mention at this point that the matters in controversy on these appeals are now probably moot, and call for a declaration and opinion of this court on abstract questions of law. The resolution of June 23, 1933 upon which the appellants center their attack fixed July 1, 1933 July 1, 1934 as the effective period and this has expired by limitation of time.

The record in the instant case presents for decision the constitutional validity of this particular resolution and no other. Hence, in effect, the appellants pray this court to give its advisory opinion as to the validity of a resolution *which is no longer operative.*

Appellee's Motion to Dismiss or Affirm.

The appellee, Board of Education of the Town of West New York, has filed a statement in the cause, opposing jurisdiction and moving to dismiss and in the alternative, to affirm, which resulted in an Order on November 9th last, noting probable jurisdiction and providing that

> "further consideration of the motion to dismiss or affirm is postponed to the hearing of the case on the merits."

Summary of Argument.

1. Chapter 12 of the New Jersey Public Laws of 1933, is not repugnant to the Constitution of the United States.

2. Chapter 12 of the New Jersey Public Laws of 1933, is proper emergency legislation, and within the reserved power of the State.

ARGUMENT.

I.

Chapter 12 of the New Jersey Public Laws of 1933, is not repugnant to the Constitution of the United States.

The appellants' argument is predicated on a fundamental misconception of the effect of the Teachers Tenure Act of 1909. This statute, the appellants urge, created in their favor, irrevocably vested contractual obligations which the Legislature was powerless to repeal, change or modify; that the force and effect to be given the Tenure Act is, that a legislative contract was created, inhibiting the state from future modification or repeal.

In short, the appellants argue that by virtue of the Tenure Law, the state of New Jersey surrendered its sovereign power for all time.

When the Teachers Tenure Act is viewed in the light of the positive mandate of the State Constitution to provide for the maintenance and support of a thorough and efficient system of Free Public Schools, and in the light of the fact that the Local Board of Education was performing a governmental function as an arm or subdivision of

the state, appellants' erroneous concept of the statute will become manifest. (Appendix, P. 20.)

The Teachers Tenure Act of 1909 was held by the New Jersey Court, in its opinion, to have been repealed in part by the 1933 Law referring to the fixing of salaries. The New Jersey Court construed the 1909 Act *not* as conferring irrevocably contractual vested rights on the appellant school teachers, but on the contrary that the statute established "a legislative status for teachers", and that the status of tenure teachers is

> "In essence dependent on a statute * * * which the legislature at will may abolish, or whose emoluments it may change."

That the 1933 Act constitutes "an implied partial repealer or amendment to the Tenure Act of 1909" and is not repugnant to the provisions of the Constitution of the State of New Jersey, inhibiting the impairment of obligations of contract. (R. 24.) The foregoing is the *ratio decidendi* of the State Court's decision.

This rational interpretation by the State Court, as to the meaning and effect to be attributed to the Tenure Act of 1909 and its elucidation of the status of the appellant teachers, will not only be accepted as binding on this Court, but also makes crystal clear that the 1909 Act did not create a *contract* between the teachers and the state, and hence, there could be no constitutional impairment by the subsequent legislation of 1933, because no *contract* in law or fact had ever existed between the state and the teachers.

In 6 Ruling Case Law, Section 337, it is stated that:

> "In determining whether a statute affecting a municipal corporation operates as an impairment of

> the obligation of a contract, regard must be had to the distinction between the rights of such a corporation in its public or governmental capacity and its private rights. So far as a municipality is an agency of government, it has no rights or powers which, as between it and the state, the legislature may not modify or abrogate at pleasure."

In *Newton* v. *Commissioners*, 100 U. S. 548, by an Act of the Legislature of Ohio, passed February 16, 1846, it was provided that, upon the fulfillment of certain terms and conditions by the proprietors or citizens of the town of Canfield, in Mahoning County, the County Seat should be "permanently established" at that town. Those terms and conditions having been complied with, the county seat was established accordingly. The terms were that the citizens must give a bond for $5,000.00 and donate a lot of ground on which to erect public buildings. On April 9, 1874, the Legislature passed an Act providing for the removal of the county seat to Youngstown. The citizens of Canfield claimed the latter act impaired the obligation of a contract. This contention was held untenable.

Mr. Justice Swayne said, in part:

> "The Dartmouth College Case was the pioneer in this field of our jurisprudence.
>
> "The principle there laid down, and since maintained in the cases which have followed and been controlled by it, has no application where the statute in question is a *public law* relating to a *public subject* within the domain of the general legislative power of the state, and involving the *public rights* and *public welfare* of the entire community affected by it.
>
> * * * * * *

The two classes of cases are separated by a broad line of demarcation. The distinction was forced upon the attention of the court by the argument in the Dartmouth College Case

* * * * * *

"It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as supervision over its subordinate public bodies.

"But cases vitally involve public interests, and legislative acts concerning them are necessarily *public laws*. Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. * * * It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil."

Gratuities, bounties, and pensions created by statute may be withdrawn at any time.

U. S. vs. Teller, 107 U. S. 64;
Fowler vs. U. S., 157 U. S. 160;
U. S. vs. Cook, 257 U. S. 523.

The Teachers Tenure Act of 1909 as we perceive it, was an encouragement held out to teachers indiscriminately and a mere *personal* right or privilege which the teachers could neither assign nor transfer and which the Legislature could withdraw entirely or in part, as it pleased.

The Legislature has the right to hold out by its statutes, encouragements to engage in certain trades or occupations and the Legislature has the right to change such form of encouragement.

In the case of *Salt Co.* vs. *East Saginaw*, 80 U. S. 611, the Court said:

> "General encouragements held out to all persons indiscriminately to engage in a particular trade or manufacture, whether such encouragement be in the shape of bounties or drawbacks or other advantages, are always under the legislative control and may be discontinued at any time."
>
> *Grand Lodge* vs. *New Orleans*, 166 U. S. 143;
> *The Rector of Christ Church* vs. *Philadelphia*, 65 U. S. 241;
> *Welch* vs. *Cook*, 97 U. S. 541.

It was a law dictated for public policy, but there was no pledge that it should not be repealed at any time. It (the Act) was addressed to no one in particular and constituted a mere announcement of policy not constituting a contract, etc.

Ettor vs. *Tacoma*, 228 U. S. 155.

The Constitution of the State of New Jersey provides for a perpetual fund for the support of free schools and contains an unequivocal command directed to the Legislature, to provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children of the state between the ages of five and eighteen years. (Appendix, P. 24.)

The state constitution also provides *inter alia*, "that the Legislature shall not pass private, local or special laws providing for the management and support of free public schools:"; that the Legislature shall pass general laws in this class of cases and for all other cases which in its judgment may be provided for by general laws.

Pursuant to the directions of the State Constitution, the Legislature adopted "An Act to establish a thorough and efficient system of free public schools, and to provide for the maintenance, support and management thereof", approved October 19, 1903. The tenure Act of 1909 is a supplement to this Act of 1903.

The tenure law of 1909 is analogous to the encouragement offered to engage in certain trades or occupations as in *Salt Co.* vs. *East Saginaw*, *supra*, and was enacted by the Legislature, in the exercise of a governmental function, and in the performance of its public duty, to maintain a system of free education. The Legislature thus proclaimed the public policy of the state, and is at liberty in the exercise of its sovereign powers, to repeal, modify or amend the Tenure Law of 1909, or, under the pressure of an urgent necessity, announce a new public policy, as it did by the 1933 Act.

The cases relied on by the appellants, relating to tenure rights, clearly involve unwarranted acts of the school boards while a tenure Act was in full force and effect *without amendment or modification*, or involve cases where teachers had made contributions to a pension or retirement fund and therefore, had acquired certain vested property rights in such fund, which obviously could not be diminished or disturbed to the prejudice of the contributors by subsequent legislation. None of these cases are in point and

fall far short of supporting the appellants' position. In none of these cases was the issue one which questions the right of the state to repeal, amend or modify its own laws. None of these cases have any relevancy to a situation where the State as the sovereign power, modifies its own law—the Tenure Act—to affect salaries to accrue in the future—beginning with and during a new and subsequent school year.

The action of the New Jersey Legislature in modifying the 1909 Tenure Act for a limited period of one year did not impinge upon any of the alleged rights of the appellants.

> "There can be no vested right in an existing law which precludes its change or repeal" 12 C. J. 958.
>
> "The term 'VESTED RIGHTS' relates to property rights only and does not apply to personal rights" 12 C. J. 956.

Judge Cooley, in his work on Constitutional Limitations (7th Ed.) page 402, states that citizens have no vested right in the existing general laws of the state which can preclude their amendment or repeal, and that there is no implied promise on the part of the state to protect its citizens against incidental injury occasioned by the changes in the law.

See

People ex rel. Cunningham, et al. vs. *Roper, et al.*, 35 N. Y. 629;

People ex rel. Davies vs. *Commissioners of Taxes*, 47 N. Y. 501;

Rector, etc. of Christ Church of Philadelphia vs. *County of Philadelphia, supra.*

The essential elements of a true contract are wanting. There is neither mutuality of obligation nor a recital. The obligation is one sided; while the state is bound the teachers are at liberty to act as they please. There is no valuable consideration to bind the bargain.

As this Court said in [illegible]

> The most vexatious problem of construction here has been: What is a contract? What are the obligations of a contract? What constitutes impairment of those obligations?

It is true that the relationship between a teacher and a board of education remains contractual after the third year, but the contract is an annual one which is deemed to be renewed each year so long as the so-called Tenure Act remains on the books and effect. The fact that in the past appellee had received salary increases to certain teachers annually bears out our contention that a new contract was entered into annually. The original employment for the first three years was by virtue of a written contract executed for each school year, and arrived at by the usual conventional methods. After the third year the contract was no longer reduced to writing but extended by virtue of the statute, from year to year. *The State [illegible] and hence the State can modify [illegible]*

If there is any doubt or ambiguity as to the legislative intent the conclusion must be resolved in favor of the public.

Charles River Bridge vs. *Warren Bridge*, 11 Pet. 420;

Knoxville Water Co. v. *Knoxville*, 200 U. S. 22.

In the instant case these appellants did nothing other than to accept another year's employment at the hands of the local Board of Education for which they were paid. All of them except Phelps accepted such employment at the reduced salaries without protest or objection.

II

Chapter 12 of the New Jersey Public Laws of 1933, is proper emergency legislation, and within the reserved power of the State.

If the appellants' contentions are tenable and if it be assumed that acquired vested contractual rights under the Penny Act of 1909, which the State was powerless to modify or repeal, still the 1933 Statute constitutes proper emergency legislation and is a constitutional exercise of the essential reserved power of the state.

The preamble to the 1933 Statute proclaims the existence of an emergency in *every* school district of the state and empowers the local school boards to fix the amount of the salaries to be paid to the school teachers during the limited period. The Act is effective for one year between the first day of July 1933 and the first day of July 1934.

It is well settled that the obligations of contracts must yield to the exercise of the police power reserved to the states.

Home Building & Loan Assn. vs. Blaisdell, 290 U. S. 398.

Vested rights cannot inhibit the proper exertion of this power.

Village of Nyack, 201 U. S. 500.

In *Mugler vs. Kansas*, 123 U. S. 473, the Court said, at page 480:

> "It is the settled law of this court that the introduction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are, where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the state, prohibiting the establishment or continuance of such traffic: in other words, that parties by entering into contracts may not estop the legislature from enacting laws intended for the public good."

Chapter 12 of the Laws of 1933 was clearly enacted for the Public Good: the lessening of the tax burden on the people of the State of New Jersey during a time of great crisis.

This Court said, in *Home Building & Loan Assn.* vs. *Blaisdell*, *supra*, at page 435:

"The reservation of this necessary authority of the state is deemed to be a part of the contract. In the case last cited, the Court answered the forcible challenge of the state's power by the following statement of the controlling principle, a statement reiterated by this court speaking through Mr. Justice Brewer, nearly fifty years later, in Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 'But into all contracts, whether made between states and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preexisting and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount wherever a necessity for their execution shall occur.' * * * The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. * * *

"Another agreement, which comes more closely to the point, is that the state power may be addressed directly to the prevention of the enforcement of contracts only when these are of a sort which the legislature in its discretion may denounce as being in themselves hostile to public morals, or public health, safety or welfare, or where the prohibition is merely of injurious practices; that interference with the enforcement of other and valid contracts according to appropriate legal procedure, although the interference is temporary and for a public purpose, is not permissible. This is but to contend that in the

latter case the end is not legitimate in the view that it cannot be reconciled with a fair interpretation of the constitutional provision. * * *

"And if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that power cannot be said to be non existent when the urgent public need demanding such relief is produced by other and economic causes."

This Honorable Court will take judicial notice of the economic crisis facing the people of the State of New Jersey and the unrest which prevailed everywhere in that State as well as throughout the entire Nation. The New Jersey courts have recognized the existence of the emergency.

Vanderbilt vs. *Brunton Piano Co.*, 111 N. J. L. 396;

Hourigan vs. *North Bergen*, 113 N. J. L. 143.

Especially it is true that in 1933, the Town of West New York and most of the other municipalities throughout the country, were in serious financial difficulties, and far in arrears in the payment not only of the teachers' salaries, but also the salaries of all other local employees. The salaries of *all* employees of the Town of West New York were reduced in 1933, and the reductions are still in force and effect. The taxpayers were not paying their taxes, for obvious reasons—they were unable, financially, to do so. Additional crushing financial burdens were laid on the town by the necessity of appropriating money for relief purposes. Additional burdens were thus placed upon the town, although the revenues were declining. The situation would

have become intolerable if the municipality were powerless to protect itself for a limited period of time by pursuing a policy of drastic retrenchment.

The appellants in the case at bar have not lost their positions and rights under the Tenure Act its application as to salaries only has been modified and that only for a limited time otherwise it is still in full force and effect.

The 1933 Act was emergency legislation of mild character and by its very terms, scrupulously preserved the teachers' rights in the Pension and Annuity Fund of the State of New Jersey, or any employee's pension fund and provides for a minimum salary of $70.00 per month. The resolution (R. 4) fixes a minimum salary of $1,200.00 per annum for elementary school teachers and $1,600.00 per annum for high school teachers. The reductions of ten to fifteen percent were extremely moderate, under the circumstances.

It was not only the appellants and the Board of Education that were affected by the resolution in question. Every property owner in West New York was affected thereby since the reductions in salaries eased the tax burden on property owners.

We might say in passing that municipalities throughout the entire State of New Jersey have relied upon the validity of the 1933 Law, temporarily reducing the school teachers' salaries. If the 1933 Act should be held invalid, the Town of West New York will be required to raise another budget — a sum in excess of $200,000.00—in order to restore the pay-cuts to the teachers. Such a result would be catastrophic. Undoubtedly, a similar situation would arise in many of the other municipalities and states of our Nation, in which school teachers are governed by Tenure Acts,

leading to increased budgets running into millions of dollars, with destructive consequences.

From the foregoing it is quite clear that the 1933 Statute under revieiw meets the criteria laid down in the *Blaisdell* case, and it is manifest that:

1. An emergency existed, the like of which had never been experienced before.

2. The legislation was for the protection of a basic interest of society, in that it made it possible for the harassed people of New Jersey to find relief, in a measure at least, from exorbitantly high taxes.

3. The relief was of a character appropriate to the emergency and the conditions were reasonable. This is self-evident and needs no elaboration.

4. The conditions in the particular case were reasonable. The salary reductions were not unreasonable and gave appellants no greater financial loss than was experienced by workers in commercial lines and by businessmen generally. The latter would have been pleased had their losses been limited to the percentages of these salary reductions. This is too well known to require proof.

5. The legislation is temporary. A definite expiration date is set in the statute.

Conclusion.

A vast field of speculative thought is suggested by the broad implications inherent in appellants' thesis. Future statutory action may well become a snare for the unwary legislators and lead to manifold assertions of permanent loss of the sovereign power of legislation to the detriment

of the public interest. By a process of rationalization and *a priori* reasoning, the impelling necessities of an ever changing social and economic order would be hampered and perhaps in large measure constructive relief rendered impotent.

To achieve such surrender of the sovereign prerogative to legislate on the ills of the body politic, the grant should be buttressed by clear, convincing and unequivocal proofs.

It is respectfully submitted that the judgments of the New Jersey Court of Errors and Appeals should be affirmed.

January, 1937.

REINHOLD HEKELER,
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Appendix.

Chapter 243 of the New Jersey Laws of 1909, (P. L. 1909, p. 398; 4 N. J. Comp. St. pp. 4763 and 4764, Secs. 106a, 106b and 106c).

A Supplement to an act entitled "An act to establish a thorough and efficient system of free public schools and to provide for the maintenance, management and support thereof," approved October nineteenth, one thousand nine hundred and three.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. The service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board; PROVIDED, that the time any teacher, principal, supervising principal has taught in the district in which he or she is employed at the time this act shall go into effect, shall be counted in determining such period of employment. No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons making the same, and filed with the secretary or clerk of the Board of Education having charge of the school in which the service is being rendered, and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing. Charges may be filed by any person, whether a member of said school board or not.

2. Said Board of Education shall have power to issue writs of subpoena on behalf of either party to compel

attendance of witnesses to testify before said board in the matter under investigation, which subpoena shall be issued under the seal of said board and be signed by the secretary or clerk thereof, and shall be served in the same manner as subpoenas issued out of the Courts of Common Pleas of this State, and every person who refuses or neglects to obey the command of such a writ, or, who, after appearing, refuses to be sworn and testify, shall in either event be liable to a penalty of fifty dollars, to be sued for in the name of said board in any court of competent jurisdiction, which penalty when collected shall be paid to the treasurer or custodian of moneys of said board. Any member of said board is hereby authorized to administer oaths to such witnesses as may appear or be brought before it, and any person who shall have been so sworn and who shall testify falsely, shall be guilty of perjury.

3. Nothing herein contained shall be held to limit the right of any school board to reduce the number of principals or teachers employed in any school district when such reduction shall be due to a natural diminution of the number of pupils in said school district; AND, PROVIDED FURTHER, that the service of any principal or teacher may be terminated without charge or trial who is not the holder of a proper teacher's certificate in full force and effect.

4. This act shall take effect September first, one thousand nine hundred and nine.

Approved April 21, 1909.

Chapter 12 of the New Jersey Laws of 1933, (P. L. 1933, p. 24).

AN ACT respecting the salaries or compensation of officers and employees of and persons holding positions in the several school districts of this State.

WHEREAS, due to present economic conditions, an emergency exists which requires that the board of education of every school district in this State be enabled to fix and determine, by resolution, the amount of salary or compensation, to be paid to officers and employees of and persons holding positions in any such school district; therefore,

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. The board of education of every school district in this State shall have full authority, by resolution, to fix and determine the salaries and compensation to be paid to officers and employees of and persons holding positions in any such school district, between the first day of July, one thousand nine hundred and thirty-three, and the first day of July, one thousand nine hundred and thirty-four, notwithstanding any such person be under tenure or not; PROVIDED, HOWEVER, that no salary or compensation of any officer or employee of or person holding a position in any school district shall be increased between the first day of July, one thousand nine hundred and thirty-three, and the first day of July, one thousand nine hundred and thirty-four; AND PROVIDED, FURTHER, that if any such person be a member of the Teachers' Pension and Annuity Fund of the State of New Jersey, or any employees' pension fund, such person may continue to pay, or cause to be paid, into such pension fund the same amount as if such salary or compensation had not been changed, and upon the death or retirement of such member, he or his beneficiary shall be

entitled to the same benefits as if his salary or compensation had not been changed; and PROVIDED, FURTHER, that in fixing salaries or compensation there shall be no discrimination among or between individuals in the same class of service; PROVIDED, HOWEVER, that the existing minimum salary of teachers of seventy dollars per month shall not be changed.

2. Nothing in this act contained shall be construed to affect or impair the continuity of position or employment under any tenure of office statute.

3. This act shall take effect immediately.

Approved February 4, 1933.

Extracts From the Constitution of the State of New Jersey.

ARTICLE IV.

Section VII.

6. Educational Fund; Custody and Distribution of; Free Public Schools. The fund for the support of free schools, and all money, stock and other property, which may hereafter be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital; shall be annually appropriated to the support of public free schools, for the equal benefit of all the people of the state; and it shall not be competent for the legislature to borrow, appropriate or use the said fund, or any part thereof, for any other purpose, under any pretense whatever. The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years.

11. Certain Private, Local or Special Laws Not to be Passed. The legislature shall not pass private, local or special laws in any of the following enumerated cases, that is to say: * * *.

Providing for the management and support of free public schools.

The legislature shall pass general laws providing for the cases enumerated in this paragraph, and for all other cases which, in its judgment, may be provided for by general laws. The legislature shall pass no special act conferring corporate powers, but they shall pass general laws under which corporations may be organized and corporate powers of every nature obtained, subject, nevertheless, to repeal or alteration at the will of the legislature.

Extracts From New Jersey School Laws. (Approved October 19, 1903) 4 New Jersey Compiled Statutes, Commencing on Page 4718.

SECTION 84. Each board of education elected as provided in this article shall be a body corporate, and shall be known as and called "the Board of Education of the (township, town or borough, as the case may be) of ..... in the county of ....." The title to school property, real and personal, previously acquired by a school district acting under the provisions of this article, or by any school district, board of education, school trustees or other body heretofore having charge and control of the public schools situate in the territory now contained in such school district, or in any part thereof, and the title to all lands, buildings and other property hereafter acquired for school purposes in said school district shall vest in the board of education incorporated under the provisions of this section.

SECTION 86. The Board of Education shall have power:

I. To appoint a person to fill a vacancy in the Board of Education, except a vacancy caused by a failure to elect, but the person so appointed shall serve only until the next election for members of the Board of Education.

II. To employ and dismiss principals, teachers, janitors, mechanics and laborers, and to fix, alter and order paid their salaries and compensation.

III. To make, amend and repeal rules, regulations and by-laws, not inconsistent with this act or with the rules and regulations of the State Board of Education, for its own government, for the transaction of business, and for the government and management of the public schools and the public school property in said district, and also for the employment and discharge of principals and teachers.

IV. To purchase, sell and improve school grounds; to erect, lease, enlarge, improve, repair or furnish school buildings, and to borrow money therefor with or without mortgage; provided, that for any such act it shall have the previous authority of a vote of the legal voters of the district.

V. To take and condemn land and other property for school purposes in the manner provided by law regulating the ascertainment and payment of compensation for property condemned and taken for public use. If either party shall feel aggrieved by any proceedings and award thereunder, said party may appeal in the manner provided by law for appeals from such proceedings and award; provided, that before beginning any proceedings for taking and condemning land and other property, the Board of Education shall have the authority of a vote of the legal voters of the district.

VI. To insure school buildings, furniture and other school property, and to receive, lease and hold in trust for the district any and all real or personal property for the benefit of the schools thereof.

VII. To enforce the rules and regulations prescribed by the State Board of Education, select the textbooks, and, in connection with the County Superintendent of Schools, to prescribe the course of study to be pursued in the school or schools under its charge.

* * * * * *

SECTION 94. A board of education may, in its corporate capacity, sue and be sued, complain and defend in any court of law and equity, and employ counsel therefor, and the amount of the expense incurred by said board in conducting or defending any such suit shall be certified to the assessor by the president and district clerk of such board, and said amount shall be assessed and collected in the next annual tax levy.

SECTION 166. The Governor, the Attorney General, the Secretary of State, the State Comptroller and the State Treasurer are hereby constituted a Board of Trustees of the Fund for the Support of Public Schools arising from appropriations heretofore made or which may be hereafter made by law, or which may arise from gift, grant, bequest or devise, which board shall be known as "The Trustees for the Support of Public Schools."

SECTION 6. The Commissioner of Education shall be one of the Trustees of the School Fund.

SUPREME COURT OF THE UNITED STATES.

Nos. 454, 455.—October Term, 1936.

454 Jay B. Phelps, Appellant, *vs.* Board of Education of the Town of West New York, et al.

455 Lucy Askam, et al., Appellants, *vs.* Board of Education of the Town of West New York, et al.

Appeals from the Court of Errors and Appeals of the State of New Jersey.

[March 1, 1937.]

Mr. Justice Roberts delivered the opinion of the Court.

The people of New Jersey have ordained by their constitution that the legislature "shall provide for the maintenance and support of a thorough and efficient system of free public schools" . . .[1] In fulfillment of this command a comprehensive school law was adopted in 1903 by which boards of education were set up for cities, towns, and school districts throughout the state.[2] Section 106 empowered these boards to make rules and regulations governing engagement and employment of teachers and principals, terms and tenure of such employment, promotion, and dismissal, salaries and their time and mode of payment, and to change and repeal such rules and regulations from time to time.[3] This general school law was amended by the act of April 21, 1909,[4] Section 1 of which provides:

"The service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency, after the expiration of a

[1] Art. IV, Sec. VII, ¶ 6, 1 N. J. Comp. St. p. lxxv.

[2] Act of Oct. 19, 1903; Laws of N. J. 1904, 5; 4 N. J. Comp. St. 4724.

[3] 4 N. J. Comp. St. 4762.

[4] Chap. 243 N. J. Laws 1909, Pamph. L. p. 398, 4 N. J. Comp. St. 4763, 4764.

period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board; . . . No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, . . . and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing. . . . ."

An Act of February 4, 1933,[5] premising that existing economic conditions require that boards of education be enabled to fix and determine the amount of salary to be paid to persons holding positions in the respective school districts, authorizes each board to fix and determine salaries to be paid officers and employes for the period July 1, 1933, to July 1, 1934, "notwithstanding any such person be under tenure"; prohibits increase of salaries within the period named; forbids discrimination between individuals in the same class of service in the fixing of salaries or compensation; and sets a minimum beyond which boards may not go in the reduction of salaries. June 23, 1933, the board adopted a resolution reducing salaries for the school year July 1, 1933, to July 1, 1934, by a percentage of the existing salaries graded upward in steps as the salaries increased in amount, except with respect to clerks, the compensation of each of whom was reduced to a named amount.

Appellants, who were principals, teachers, and clerks employed by the appellee, petitioned the Department of Public Instruction, in accordance with the school law, praying that the action of the board be set aside. The Commissioner of Education dismissed the petition and, upon appeal from his action, the State Board of education affirmed the decision. The appellants applied for certiorari from the Supreme Court, assigning among other reasons that the decision violated Art. I, Sec. 10, and Sec. 1 of the Fourteenth Amendment, of the federal Constitution. The writs[6] issued and, after hearing, the court affirmed the action of the ad-

[5] Chap. 12, N. J. Laws 1933, Pamph. L. p. 24.

[6] Two writs were issued. The only difference between the two cases, which were heard as one, is that in the *Phelps* case the employe refused to accept the reduced salary. In the case of *Askam, et al.*, the employes took the reduced salary under protest.

ministrative tribunal.[7] The Court of Errors and Appeals affirmed the judgment upon the opinion of the Supreme Court.[8]

The position of the appellants is that by virtue of the Act of 1909 three years of service under contract confer upon an employe of a school district a contractual status indefinite in duration which the legislature is powerless to alter or to authorize the board of education to alter. The Supreme Court holds that the Act of 1909 "established a legislative status for teachers, but we fail to see that it established a contractual one that the legislature may not modify. . . . The status of tenure teachers, while in one sense perhaps contractual, is in essence dependent on a statute, like that of the incumbent of a statutory office, which the legislature at will may abolish, or whose emoluments it may change."

This court is not bound by the decision of a state court as to the existence and terms of a contract, the obligation of which is asserted to be impaired, but where a statute is claimed to create a contractual right we give weight to the construction of the statute by the courts of the state.[9] Here those courts have concurred in holding that the act of 1909 did not amount to a legislative contract with the teachers of the state and did not become a term of the contracts entered into with employes by boards of education. Unless these views are palpably erroneous we should accept them.

It appears from a stipulation of facts submitted in lieu of evidence that after a teacher has served in a school district under yearly contracts for three years it has not been customary to enter into further formal contracts with such teacher. From time to time, however, promotions were granted and salary raised for the ensuing year by action of the board. In the case of many of the appellants there have been several such increases in salary.

Although after the expiration of the first three years of service the employe continued in his then position and at his then compensation unless and until promoted or given an increase in salary for a succeeding year, we find nothing in the record to indicate that the board was bound by contract with the teacher for more

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[7] 115 N. J. Law 310.

[8] 116 N. J. Law 412, 416.

[9] *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, 595; *Tampa Water Works* v. *Tampa*, 199 U. S. 241, 243; *Milwaukee Elec. Ry. Co.* v. *Railroad Comm.*, 238 U. S. 174, 184; *Seton Hall College* v. *South Orange*, 242 U. S. 100, 103; *Coombes* v. *Getz*, 285 U. S. 434, 441.

than the current year. The employe assumed no binding obligation to remain in service beyond that term. Although the act of 1909 prohibited the board, a creature of the state, from reducing the teacher's salary or discharging him without cause, we agree with the courts below that this was but a regulation of the conduct of the board and not a term of a continuing contract of indefinite duration with the individual teacher.

The resolution of June 23, 1933, grouped the existing salaries paid by the board into six classes the lowest of which comprised salaries between Twelve hundred dollars and Nineteen hundred and ninety-nine dollars; and the highest included salaries ranging between Four thousand dollars and Fifty-six hundred dollars. The reduction in the lowest class for the coming year was ten per cent; that in the highest class fifteen per cent. Salaries in the intermediate classes were reduced eleven, twelve, thirteen, and fourteen per cent. It resulted that in some instances a teacher receiving the lowest salary in a given bracket would have his compensation reduced to a figure lower than the reduced compensation of one receiving the highest salary in the next lower bracket. From this circumstance it is argued that the board's action arbitrarily discriminated between the employes and so denied them the equal protection of the laws guaranteed by the Fourteenth Amendment.

We think it was reasonable and proper that the teachers employed by the board should be divided into classes for the application of the percentage reduction. All in a given class were treated alike. Incidental individual inequality resulting in some instances from the operation of the plan does not condemn it as an unreasonable or arbitrary method of dealing with the problem of general salary reductions or deny the equality guaranteed by the Fourteenth Amendment.

Judgments affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.